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No. \_\_\_\_\_

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ALEXANDER L STEVAS,  
CLERK

In The

**Supreme Court of the United States**

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October Term, 1983

**OLSON MOTOR COMPANY, a MINNE-  
SOTA CORPORATION AND RAY A. OLSON,**  
**Petitioners,**

vs.

**GENERAL MOTORS CORPORATION, a  
DELAWARE CORPORATION and GENERAL  
MOTORS ACCEPTANCE CORPORATION,  
a NEW YORK CORPORATION,**

**Respondents,**

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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## QUESTIONS PRESENTED FOR REVIEW

1. Considering that Olson Motor Company was General Motor's automobile dealer under its Dealer Selling Agreement during which time Olson Motor Company had a separate Inventory Security Agreement with General Motors Acceptance Corporation, the wholly-owned subsidiary of General Motors, to finance Olson Motor Company's purchase of new cars under its Dealer Selling Agreement:

Does the holding of the Court of Appeals for the Eighth Circuit that Olson Motor Company does not have an independent cause of action against General Motors Acceptance Corporation under 15 U.S.C. Sec. 1222 for damages caused by its bad faith performance of its Inventory Security Agreement importantly diminish the remedial purpose of the Act? Moreover, does this holding create a schism with the Tenth Circuit's decision in Colonial Ford, Inc., vs. Ford Motor Company, 592 F.2d 112 (10th Cir. 1979), which this Court should resolve?

2. Considering further that Olson Motor Company released General Motors from liability for any claims it had against General Motors under its Dealer Selling Agreement:

Does the holding of the Court of Appeals for the Eighth Circuit that absent circumstances indicating an opposite intent where Olson Motors Company released General Motors it also released its agent General Motors Acceptance Corporation from liability under 15 U.S.C. Sec. 1222, adopt into case law for Dealer Suits Against Automobile Manufacturers, 15 U.S.C. Sec. 1221-1225, a law of release that traps an unwary automobile dealer and that importantly conflicts in

principle with the holding of this Court in Zenith Radio Corporation vs. Hazeltine Research, Inc., 401 U.S. 321?

LIST OF ALL PARTIES TO THE PROCEEDINGS  
IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were Olson Motor Company, a Minnesota corporation and Ray A. Olson, Appellants; and General Motors Corporation, a Delaware corporation and General Motors Acceptance Corporation, a New York corporation, Appellees.

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## OPINIONS BELOW

The Honorable Robert G. Renner, Judge of the United States District Court for the District of Minnesota, rendered an unpublished Memorandum and Order on January 7, 1982, and entered on January 8, 1982, which denied Olson Motors' Motion to Alter, Amend or Set Aside the Judgment. This Opinion is copied in Appendix B.

On April 17, 1981, Judge Renner rendered an unpublished Memorandum and Order entered on April 20, 1981, denying defendants' Motions for Summary Judgment. This Opinion is copied in Appendix C.

The Opinion of the United States Court of Appeals for the Eighth Circuit whose decision is sought to be reviewed is reported at 703 F. 2d 283 (8th Cir. 1983). This Opinion is copied in Appendix A.

## JURISDICTION

Petitioners filed a civil action on January 18, 1971, against General Motors and General Motors Acceptance Corporation stating a claim against both under the federal statutory cause of action authorized by 15 U.S.C. Sec. 1221-1225. The case was filed in the United States District Court in Phoenix, Arizona by virtue of the jurisdictional authority contained in 15 U.S.C. Sec. 1222. Pursuant to 28 USC 1404 (a) the case was transferred to the District of Minnesota on January 18, 1971. Trial to a jury began on June 2, 1981, and on August 12, 1981, the jury rendered its special verdict. (Appendix E).

On August 26, 1981, judgment was entered in favor of Defendants General Motors and General Motors Acceptance Corporation against Petitioners. (Appendix D).

On September 4, 1981, Petitioners timely filed a Motion to Alter, Amend, or Set Aside Judgment. The trial court denied this motion by its Memorandum and Order dated January 7, 1982, and filed January 8, 1982. (Appendix B).

On February 5, 1982, Petitioners perfected their appeal to the United States Court of Appeals for the Eighth Circuit.

On March 28, 1983, the United States Court of Appeals for the Eighth Circuit entered its Opinion affirming the judgment of the District Court. (Appendix A). Petitioner seeks review of this Opinion by this Court.

On April 11, 1983, Petitioners timely filed a Motion for Rehearing. On May 17, 1983, the United States Court of Appeals for the Eighth Circuit denied the motion for rehearing. (Appendix G).

This Court has jurisdiction to hear this petition by virtue of 28 U.S.C. Sec. 1254 (1).

## CHAPTER 27 - AUTOMOBILE DEALER SUITS AGAINST MANUFACTURERS

### Sec.

- 1221. Definitions.
- 1222. Authorization of suits against manufacturers; amount of recovery; defenses.
- 1223. Limitations.
- 1224. Antitrust laws as affected.
- 1225. State laws as affected.

### 1221. DEFINITIONS

As used in this chapter

- (a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.
- (b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.
- (c) The term "automobile dealer" shall mean any person, partnership, corporation, association or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

Aug. 8, 1956. c. 1038, 1,70 Stat. 1125

**1222. AUTHORIZATION OF SUITS AGAINST MANUFACTURERS; AMOUNT OF RECOVERY; DEFENSES**

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of

the dealer to act in good faith.

Aug. 8, 1956, c. 1038, 2,70 Stat. 1125.

**1223. LIMITATIONS**

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued.

Aug. 8, 1956, c. 1038, 3,70 Stat. 1125

**1224. ANTITRUST LAWS AS AFFECTED**

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

Aug. 8, 1956, c. 1038, 4,70 Stat. 1125

**1225. STATE LAWS AS AFFECTED**

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled.

Aug. 8, 1956, c. 1038 5,70 Stat. 1126

STATEMENT OF THE CASE

Olson Motors filed a suit in the District Court of the United States under 15 U.S.C. Sec. 1222 against General Motors (GM) and General Motors Acceptance Corporation (GMAC) alleging that each was guilty of coercive and damaging conduct. The District Court's basis of jurisdiction to decide the case is stated in 15 U.S.C. Sec. 1222. A factual background is material to explain how the suit developed.

Ray Olson's father, Andy, had been GM's Cadillac and Oldsmobile dealer in Albert Lea, Minnesota, since 1945. In 1961, Ray became GM's Pontiac dealer and he operated his Pontiac dealership alongside his father's dealership business. The Olsons' had an excellent reputation and they successfully operated both dealership businesses.

In 1967-68, Andy was ready to retire. At that time, GM demanded that Ray build a new dealership facility or be terminated. (Transcript, Vol. VII, pp. 52, 66, 68). Both GM and Ray knew that he would have to invest everything he had and borrow substantial additional funds to comply with GM's demand to build or be terminated. Ray did not wish to build, but GM assured Ray that it had thoroughly studied the matter and that GM would not insist he make this large investment unless it would be profitable.

Thereafter, GM advised Ray and helped him to plan the financing and structure of the venture. Olson Motors was formed as a new corporation to combine Ray

and his father's dealership businesses into one dealership. Olson Motors began operating in the new dealership premises that Ray built on June 2, 1969.

In helping Ray plan for the new dealership, GM told Ray he would need a large finance company like GMAC to finance his operation instead of the small local bank that the Olsons, father and son, had been using. GM said that it would send GMAC to him. Shortly thereafter, GMAC came and made plans with Ray to solely finance Olson Motors' inventory. GMAC commenced taking over the financing from the local bank on May 28, 1969, and on June 4, 1969, Ray signed GMAC's financing contract; - the Inventory Security Agreement (Appendix L).

General Motors Acceptance Corporation is wholly-owned by General Motors. In this case GMAC, in answer to interrogatories and by testimony from its officials, described its general business, function and main purpose as financing the distribution of new automobiles and other new products manufactured by GM (Transcript, Vol. XVII, pp. 150-159; Vol. XX, p. 22; Vol. XXI, pp. 49-50). GM sells its cars only to GM dealers who must pay GM full cash value for the new cars. GMAC provides the cash dealers need to buy GM cars.

Thus, GMAC, through its financing contract with the dealer, provides a crucial link in the distribution of GM cars. Unlike other institutions, which can also provide this link, GMAC is wholly-owned by GM, promoted by GM, and devoted to providing this financial link only in GM's distribution business.

As another part of its automobile distribution net-

work, GM maintains a well-organized nationwide system of regional and zone offices, staffed with GM officials and employees that closely supervise and monitor GM dealers. On October 14-15, 1969, GM officials studied Olson Motors' operation and determined that it needed an immediate infusion of \$72,528 cash for operating capital.

Eight days later, on October 22, 1969, GMAC came to Olson Motors dealership and, at approximately 3:45 p.m., told Ray Olson that he had to invest about \$71,500 dollars cash into Olson Motors by the end of that business day. Otherwise, GMAC told him it would remove all of his inventory from the premises. (Transcript, Vol. IX, pp. 21-22; Vol. XII, pp. 93-97.)

Ray pleaded for more time or for GMAC to use some other method or means other than public removal, such as securing the car keys or posting a GMAC employee. GMAC refused. That afternoon, it removed Olson Motors' inventory - 88 new and used cars - and stored them in public view at the Albert Lea fairgrounds.

A few days after the inventory seizure, GMAC told Ray that if he would reduce his debt by approximately \$60,000, then it would reopen Olson Motors' line of credit and allow Olson to purchase new cars from GM. Ray borrowed \$60,000 dollars from two friends and paid the funds to GMAC. Ray secured his friends with an assignment of Olson Motors dealership assets and his personal equity in the new dealership real estate.

Contrary to its representation, GMAC never re-

opened Olson Motor's credit line. In any event, the public repossession alone had destroyed the dealership's reputation and business.

Ray realized that he would have to sell the business if he was to honor his debt to his friends. The best value for the dealership assets was to sell them to a person who GM would approve as a successor dealer. Without GM's approval, the purchaser would not have a Dealer Selling Agreement and would not have any use for the assets. A few days after the GMAC repossession, a GM official advised Ray to sell while he had something left to sell and, thereafter he helped to arrange a sale of the dealership assets to a Mr. Krueger, a person GM sent from Minneapolis to be the successor dealer to Olson Motors.

On February 27, 1970, the sale arrangements were nearly complete. But GM said it would not sign a new Dealer Selling Agreement with Mr. Krueger unless Olson Motors formally settled and relinquished its claims under its existing Dealer Selling Agreements. As a matter of policy, GM will not have two Dealer Selling Agreements outstanding at the same time for the same line of cars for the same territory. In order to have the sale completed, Olson Motors executed the terminating letters (Appendix H, I, and J) releasing its claims under the existing Dealer Selling Agreements with Cadillac, Pontiac and Oldsmobile so that GM could formally make new agreements with Krueger as the successor dealer.

On November 4, 1970, Olson Motor's filed this action against GM and GMAC in the U.S. District Court of Arizona. In answer to the Complaint, GM

pled as an affirmative defense that the three letters released it. GMAC learned about the release letters for the first time when it received a copy of GM's answer. GMAC then pled as an affirmative defense that when Olson Motors released GM it thereby released GMAC.

The case began trial to a jury on June 2, 1981. At the close of evidence, the District Court refused to give any instructions to the jury on the question of whether or not Olson Motors released GMAC when it released GM. The trial court found that there was no evidence that would in any way indicate that Olson Motors' intended to release or did release GMAC by signing the GM releases. (Appendix, F-2).

The case went to the jury on special interrogatories which allowed the jury to make a finding against either or both GM and GMAC under 15 U.S.C. Sec. 1222. The issue of the validity of GM's defense of release was also submitted for the jury to decide since Olson Motors claimed the GM release was tainted with economic duress.

The jury found that both GM and GMAC were guilty of bad faith conduct but that only GMAC's bad faith conduct proximately caused damage. (Appendix, E-1 to E-3). In answer to special interrogatory No. 13, the jury found that GM's release was valid. (Appendix, E-6).

After the special verdict, the trial court expressly rejected the modern law of release for use in interpreting the effect of the GM release. (Appendix, B-5).

Instead, the trial court used the principle from the old law of release that absent circumstances indicating an opposite intent, an injured party who releases one tortfeasor releases all others. The trial court thus interpreted GM's release as extinguishing Olson Motor's claim against GMAC. (Appendix, B-5).

The ultimate basis of the trial court's rationale was its finding that GMAC was not independently liable for its coercive conduct under 15 U.S.C. Sec. 1222 because (1) its Inventory Security Agreement was not a franchise contract within the meaning of 15 U.S.C. Sec. 1221 (b) (Appendix, B-3); and (2) its relationship of common law agency to GM did not establish its independent liability under the Act. (Appendix, B-7). Thus, the court reasoned that since GMAC's liability was dependent upon GM, then the GM release operated to release GMAC.

Olson Motors' appealed the trial court's decision to the Court of Appeals for the Eighth Circuit which decided the case by exactly the same rationale used by the trial court. (Appendix, A-7 to A-8).

### REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit Court of Appeals holding that GMAC is not independently liable to Olson Motors under the Automobile Dealer's Suits Against Manufacturers Act, 15 U.S.C. Sec. 1222, enables the automobile manufacturer to avoid or substantially burden the remedy Congress enacted for the dealer's benefit. Moreover, the holding creates a schism with the Tenth Circuit which this Court should resolve.

This Court has not issued an opinion interpreting the meaning of 15 U.S.C. Sec. 1221-1225. The definitional language of Sec. 1221 (a) and (b) of the Act holds the answer to the question presented in this case: What is the nature of a dealer's statutory remedy when an automobile manufacturer's wholly-owned subsidiary coerces the dealer? The Tenth Circuit Court of Appeals has held that in such a case, the wholly-owned subsidiary of the automobile manufacturer is independently liable for damages caused by its coercive conduct. Colonial Ford, Inc. vs. Ford Motor Company, 592 F.2d 1126 (10th Cir. 1979).

Olson Motors made a Dealer Selling Agreement with General Motors on June 2, 1969, to sell GM's cars (Appendix, K)<sup>1</sup>, and, at the same general time, Olson Mo-

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1 Pontiac, Cadillac and Oldsmobile each made a Dealer Selling Agreement. The three are the same except for name changes. Appendix K is the Pontiac Selling Agreement.

tors made an Inventory Security Agreement (Appendix L)<sup>2</sup> with GMAC for it to finance Olson Motors' purchase of GM's cars.<sup>3</sup>

GMAC's demand that Ray Olson immediately invest \$71,500 capital into Olson Motors was made pursuant to Provision Six (6) of its Inventory Security Agreement (Appendix, L-2) which stated that GMAC could immediately repossess all security it financed if it deemed itself insecure.<sup>4</sup> Ray could not meet this demand on such short notice. That afternoon GMAC repossessed the inventory and removed it to the Albert Lea County Fairgrounds. GMAC's repossession effectively closed down and terminated Olson Motors dealership business.

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2 Because the printed Inventory Security Agreement only provides space for six cars there were several executed. The Inventory Security Agreement that is copied in Appendix L was the one used at trial to represent all these agreements. Transcript, Vol. XVIII, pp. 82-83.

3 Transcript, Vol. XVIII, pp. 51-52, 57-59.

4 Deleted.

5 Deleted.

6 Page 8, Brief of Appellee and Cross-Appellant General Motors Acceptance Corporation, dated May 14, 1982, and filed in this case at the U.S. Court of Appeals for the Eighth Circuit.

The jury found that GMAC's repossession was done in bad faith under 15 U.S.C. Sec. 1222 and proximately caused Olson Motors damages in the amount of \$588,520. (Appendix , E-2 and E-3).

The trial court denied judgment on the verdict on the ultimate basis that under the Act GMAC was not independently liable to Olson Motors.

The trial court interpreted Sec. 1221 (b) to mean that GMAC's Inventory Security Agreement was not a franchise agreement under Sec. 1221 (b) (Appendix, C-12<sup>7</sup> and b-3)<sup>8</sup>. This ruling means that GMAC has no statutory duty of good faith respecting its performance of its franchise agreement and that it could only be liable if it acted as GM's agent under 15 U.S.C. Sec. 1221 (e).

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7 Trial Court's Memorandum Order Ruling on GMAC's Motion for Summary Judgment.

8 Trial Court's Memorandum Order Denying Olson Motors Judgment on the Verdict.

The Eighth Circuit Court of Appeals exactly followed the trial court reasoning and thereby adopted its ruling as case law for the Eighth Circuit. (Appendix, A-5 and A-6).

This interpretation of Sec. 1221 (a) and (b) means that a manufacturer can circumvent or substantially burden a dealer's remedy under 15 U.S.C. Sec. 1222 when its wholly-owned subsidiary coerces its dealer by use of a subsidiary's contract.

Congress' purpose for enactment of 15 U.S.C. Sec. 1221-1225, was to create a cause of action in Federal Courts, where none previously existed, between automobile manufacturers and their dealers to review the good faith conduct of the manufacturer in performing any of the provisions of the dealer's franchise. (Legislative History, Appendix, M-2 and M-9).

Congress reported that the automobile franchise system was devised by the automobile manufacturers to secure maximum rights with a minimum of liability. Congress reported that this franchise system was a method by which the automobile manufacturer could control the distribution of its product in a system that amounted to quasi-integration of the retail level of distribution. (Legislative History, Appendix, M-5 and M-6).

With this knowledge, would Congress have fashioned a remedy against automobile manufacturers which could be avoided by their wholly-owned subsidiaries?

The proposition that a wholly-owned subsidiary is not independently liable allowed GMAC to avoid Olson Motors' remedy in this case. If this concept is

maintained, then an abused dealer's access to the Act's remedy depends upon whether or not he has affirmative evidence to prove that the subsidiary acted as the agent of the manufacturer under Sec. 1221 (e).

The burden of proving that a wholly-owned subsidiary acted as the common law agent of the manufacturer is a very burdensome task.

Reported cases illustrate the difficulty of carrying this burden. Stansifer vs. Chrysler Motor Corp., 487 F.2d 59. (9th Cir. 1973); York Chrysler Plymouth, Inc. vs. Chrysler Credit Corp., 447 F.2d 786. (5th Cir. 1971); Marquis vs. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978). Petitioner proved agency because of the chance finding of a memorandum showing a meeting between GM and GMAC about Olson Motors on October 17, 1969 and the testimony of a former GM official who contracted terminal cancer and agreed to give Olson a deposition before he died.

Evidentiary requirements for proof of agency give the manufacturer a great advantage. The fact that the manufacturer solely owns its subsidiary is no help in meeting this burden because it is no evidence of agency. 19 Am Jur 2d Corporations, Sec. 717, p. 217. The evidence must show that the subsidiary acted with the consent and at the direction of its parent. Stanisfer, *supra*. By its nature this evidence is controlled by the manufacturer or its subsidiary. A manufacturer and its subsidiary are not likely to produce evidence that the subsidiary was the parent's agent in the coercive transaction since this would make both of them liable. On the other hand, without such evidence, neither of them would be liable: the manufacturer would

not be liable because it did not act in the coercive transaction, Marquis vs. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978); the subsidiary would not be liable since the holding that its collateral contract is not a franchise within Sec. 1221 (b) means that it is not independently subject to the good faith duty imposed by Sec. 1222.

Congress said it would not rely on the goodwill of automobile manufacturers to correct dealer abuse. (Legislative History, Appendix, M-9 and M-10). This being so, Congress could not have intended for a dealer's remedial rights to be importantly compromised when the dealer is coerced by the manufacturer's wholly-owned subsidiary. It is reasonable to believe that the very purpose Congress had in mind when it used the all inclusive definitions in 1221 (a) and (b) was to make wholly-owned subsidiaries primarily liable for their own coercive acts under their own collateral contracts.

Courts have recognized that if a wholly-owned subsidiary of an automobile manufacturer is not liable under 15 U.S.C. Sec. 1222, then the goal of the Act can be easily thwarted by manufacturers who transact business through wholly-owned subsidiaries. DeValk Lincoln Mercury, Inc., vs. Ford Motor Company, 550 F. Supp. 1199 at 1202 (N.E. III. E.D. 1982). Barney Motor Sales vs. Cal Sales, Inc., 178 F. Supp. 172 at 175 (S.D. CA 1959). The Tenth Circuit held that it would be unrealistic to suppose that a wholly-owned subsidiary, working to facilitate the parent's distribution, would act other than to promote the desires of its parent. Colonial Ford, Inc., vs. Ford Motor Company, 592 F.2d 1126 at 1129 (10th Cir. 1979).

Evidence from GMAC admitted that its function is to provide assistance to GM in "the distribution" of products manufactured by GM. Evidence from GMAC is that one of its main purposes in financing dealers is to provide cash to GM to aid in its distribution of automobiles to the retail public through GM dealers.

This evidence together with GM's sole ownership of GMAC would seem to make it an automobile manufacturer under Sec. 1221 (b) as a matter of law. Colonial Ford, Inc., vs. Ford Motor Company, *supra*. As a statutory automobile manufacturer, GMAC's Inventory Security Agreement, which defines the rights and liabilities of it and the dealer, would seem to be within the definition of a franchise agreement under Sec. 1221 (b).

GMAC's Inventory Security Agreement was a vital part of Olson Motors' dealership franchise. Only with such a financing contract could Olson Motors purchase GM cars and utilize the GM Dealer Selling Agreement. Since Olson Motors had this financing contract with GMAC, then GM had the complete and total ability to control GMAC's performance of this financing contract. The Eighth Circuit Court of Appeals noted GM's control when it cited the evidence in GMAC's manual that mandated for GMAC to notify GM whenever it intended to repossess a GM dealer's inventory. (Appendix, A-6).

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<sup>9</sup> Transcript, Vol. XVII, pp. 158-159; Vol. XX, p. 22; Vol. XXI, pp. 49-50.

If the manufacturer's functional control over its subsidiary is sufficient to make the subsidiary itself independently liable under 15 U.S.C. Sec. 1222, then a dealer has a fair opportunity for relief where the subsidiary's coercion causes him damage. Colonial Ford, vs. Ford Motor Company, *supra*. In contrast, if the Eighth Circuit's ruling is allowed to stand, any dealer damaged by a subsidiary's coercion must accomplish the onerous task of proving common law agency in order to secure any relief.

A remedial statute should be interpreted to give effect to Congress' purpose for enacting it. 73 Am Jur 2d Statutes Sec. 279, p. 443. Would Congress have created a remedy for an automobile dealer and placed the key to that remedy in the hands of the manufacturer and its subsidiary?

The interpretation of 15 U.S.C. Sec. 1221 and 1222 suggested by the Colonial Ford case is necessary to give dealers the full protection from automobile manufacturer's coercion that Congress intended they should have under the terms of any automobile franchise. (Legislative History, Appendix, M-10).

II. The Eighth Circuit Court of Appeals held that, absent circumstances indicating an opposite intent, when Olson Motors released General Motors, it also released General Motors Acceptance Corporation. This ruling conflicts in principle with a decision of this Court. It creates a release law for Automobile Dealer Suits Against Manufacturers, 15 U.S.C. Sec. 1221-1225, which was expressly disapproved in Zenith Radio Corporation vs. Hazeltine Research, Inc., 401 U.S. 321, 344 to 348 (1971).

The basic principle of the modern law of release is that the effect of a release is determined from the intentions of the parties. Zenith Radio Corporation vs. Hazeltine Research, Inc., 401 U.S. at 346. The Zenith case, *supra*, applied the modern law to an antitrust action.

The Automobile Dealers Suits Against Manufacturers Act, 15 U.S.C. Sec. 1221-1225, was meant by Congress to supplement the antitrust laws of the United States (Appendix, M-1).

But the rule of the Zenith case has been held to apply to release questions involving not just antitrust cases, but all types of federal statutory causes of action. LocaFrance U.S. Corporation vs. International Systems Leasing, 558 F.2d 1113 (2nd Cir. 1977). In 1981, this Court suggested that the modern law of release is appropriate to use in tort-like causes of action. Texas Industries vs. Radcliff Material, Inc., 451 U.S. 630, footnote 5 at pages 634-635.

After GMAC repossessed Olson Motors' inventory, a Pontiac official suggested that Olson Motors sell its

business while it could still be salvaged.<sup>10</sup> In December, 1969, and in January, 1970, with Pontiac's help,<sup>11</sup> Olson Motor's assets were sold to a Mr. Krueger. GM would not finalize the sale until Olson Motors concluded its affairs under its existing Dealer Selling Agreement with GM. Otherwise GM would have two Dealer Selling Agreements outstanding for the same territory.<sup>12</sup>

Therefore, in order to complete the sale, Olson Motors signed three releases, one for Cadillac, one for Oldsmobile, and one for Pontiac, (Appendix, H-1, I-1 and J-1).

GMAC did not participate at all in the transactions involving the GM releases or in the sale of Olson Motors' assets. Nothing indicated that Olson Motors was releasing its claims against GMAC for repossessing its inventory. GM told Olson that it was not involved in GMAC's repossession. GMAC never knew the GM releases existed until GM pled them as an affirmative defense and served a copy of its answer on GMAC.

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10. Transcript Vol IX, p. 40-43, 56-57; Deposition of Schultz, p. 155-156, admitted into evidence, Designation of Deposition Testimony, p.4.

11. Transcript Vol. IX, p. 72-80. Olson Exhibit 14C.

12. Transcript Vol. XVII, p.30-32.

13. Transcript Vol. XVII, p. 160-161.

The releases signed by Olson do not expressly or by inference mention GMAC or GMAC's Inventory Selling Agreement.

The conclusion that Olson Motors did not intend to release GMAC was so clear that the trial court twice stated on the record that there was no evidence to support the giving of any of GMAC offered instructions on its release defense. Specifically, the trial court judge said:

"It is the Court's view that there is no evidence which would support this instruction since there is no evidence which would in any way indicate that Plaintiff intended to or did release GMAC by signing the GM release." (Appendix, E-2).<sup>14</sup>

If the modern law of release is used the finding of the trial judge means that Olson did not release GMAC.

Instead, the trial court, motivated by its finding that GMAC was not independently liable, reasoned with the

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14. This finding is exactly like the finding the trial court made in the Aro Mfg. Co., vs. Convertible Top Replacement Co., 377 U.S. 476, which this Court referred to in explaining that a litigant does not have to expressly reserve his claims against others in order not to release them. Zenith Radio Corporation vs. Hazeltine Research, Inc., 401 U.S. at 347.

same kind of rationale that courts used when applying the old laws of release to deny claims. In so doing, it ended up concluding that absent circumstances indicating a contrary intention Olson Motors released GMAC when it released GM.

The ruling meant that Olson Motors was trapped into releasing GMAC like the unwary litigant the court intended to protect through its opinion in the Zenith case. 401 U.S. at 348.

But more importantly for this Court is the effect that the Court of Appeals' holding can have on any dealer who has a claim against a subsidiary under 15 U.S.C. Sec. 1222. If the Court of Appeals' decision, is maintained, any automobile dealer that is coercively terminated by a subsidiary is in danger of releasing his federal statutory remedy against that subsidiary if he makes a good faith effort with the true manufacturer to transfer his dealership assets, which he can no longer use, to a successor dealer.

The modern law of release is the appropriate one to use for automobile dealers' suits under 15 U.S.C. Sec. 1222 because it promotes the dealer to make such a settlement with the true manufacturer. And such a settlement, in turn, is beneficial to the successor dealer, the dealer's creditors, and the local economy.

The Court of Appeals' rule can only encourage another dealer similarly injured to stubbornly let his dealership assets deteriorate on the dealership premises rather than to chance incurring a second injury of inadvertently releasing the party that injured him.

The District Court and the Court of Appeals justified their use of the old release law on the grounds that this case involved a principal and an agent rather than joint tortfeasors. This attracted both Courts to the logic that the release of the principal must necessarily extinguish the agent's liability.

But neatness in logic does not warrant injustice in result. The application of this principal-agent distinction simply denies Olson Motors' claim for compensation while serving no sound purpose at all. The logic ignores the fact that at the time of injury, GMAC had the duty to use good faith. After the injury occurred Olson Motors' right to be fully compensated arose. This remedial right stands against any party whose violation of duty caused injury. As explained in the McKenna and Zenith cases, this claim should not be extinguished except by an intentional, contractual settlement in accordance with the modern law of release.

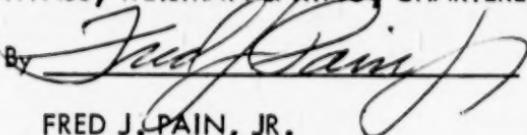
Justice Rutledge's comments in McKenna vs. Austin, 77 U.S. App. D.C. 228, 134 F.2d 659 are appropriate for this case; the old law of release served only as an instrument to deprive Olson Motors of full compensation for its injury.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari properly may be granted.

RESPECTFULLY SUBMITTED this 11th day of Au-gust, 1983.

FRED J. PAIN, JR., P.C. and  
HVASS, WEISMAN & KING, CHARTERED

By 

FRED J. PAIN, JR.  
7136 East Stetson Drive  
Scottsdale, Arizona 85251  
Counsel for Petitioner

## **Appendix A-1**

### **UNITED STATES COURT OF APPEALS For the Eighth Circuit (Caption Deleted)**

**Appeals from the United States District Court for the  
District of Minnesota**

**Nos. 82 - 1198 and 82 - 1267**

**AFFIRMED**

**Filed: March 28, 1983**

**Before ROSS and FAGG, Circuit Judges, and SCHATZ,  
District Judge.\***

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**ROSS, Circuit Judge.**

On November 4, 1970, Olson Motor Company and Ray and Donna Olson filed this civil action against General Motors (GM) and General Motors Acceptance Corporation (GMAC) under the Automobile Dealer's Day in Court Act, 15 U.S.C. Sec. 1221 to 1225 (1982), and under federal antitrust law. The case is presently before this court on appeal by Ray Olson and Olson Motor and on cross appeal by GMAC.

#### **Facts**

Prior to 1961, Ray Olson became a GM dealer as a stockholder in his father's Cadillac-Oldsmobile dealership, Olson Motors, Inc. in Albert Lea, Minnesota. In 1961, Ray's father, Andy Olson, purchased Ray's stock in Olson Motors, Inc. and leased a portion of the premises to Ray, doing business as Downtown Motors. Through this arrangement Ray secured a Pontiac franchise.

## Appendix A-2

In 1969, the Olson Motor Company, a new corporation wholly owned by Ray Olson, entered into dealership agreements with the Pontiac, Oldsmobile and Cadillac Divisions of General Motors. Olson Motor operated from a new larger facility than its predecessors. Ray Olson experienced financial difficulties and in October 1969, GMAC, with whom Ray Olson had a financing agreement, determined that Olson Motor was "out of trust" on its agreement and impounded the company's new and used car inventory in which it had a security interest.

\*The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, sitting by designation.

In early November 1969, Ray Olson obtained loans from two businessmen, Chance and Lebert, of approximately \$60,000. This sum was paid to GMAC to secure release of the used car inventory to Olson Motor. Subsequently, Chance and Lebert bought out Olson's equity in the business for \$5,000 plus a forgiveness of the \$60,000 loan. In 1970 Chance and Lebert sold the business assets to Krueger for \$37,000. The sale was contingent upon the granting of a dealer agreement by the three General Motors divisions. Oldsmobile, Pontiac and Cadillac entered into new dealer agreements with Krueger after Ray Olson agreed to terminate the Olson Motor Company franchises and released each of the three GM divisions from all claims.

Plaintiffs brought this action against GM and GMAC under the Dealer's Day in Court Act and federal antitrust law alleging that GM failed to provide adequate assistance or advice to help Ray Olson manage his dealership

### Appendix A-3

which resulted in its failure. Plaintiffs argue that the failure of Olson Motor was a direct result of GM's conduct in dictating the capital structure and financing needs of Olson Motor. Plaintiffs further claim that GMAC actively participated in this scheme through its financing arrangements and subsequent impoundment of plaintiffs' automobile inventory.

Prior to trial, GM and GMAC filed motions for summary judgment arguing that the releases signed by Ray Olson acted to absolve GM and GMAC of any liability. The district court on April 17, 1981, denied the motions and concluded that the validity and effect of the releases were issues for trial. The court also refused to grant summary judgment on the issue of whether GM could be held liable for the acts of GMAC, holding that the question of agency was one for jury resolution. Additionally, the court held that GMAC was not independently liable under the Dealer's Act because GMAC was not a party to the franchise agreement. The court held that GMAC could be held liable only upon a finding by the jury of an agency relationship between GM and GMAC.

The case proceeded to trial and on August 12, 1981, at the close of plaintiffs' case the district court dismissed Ray and Donna Olson as plaintiffs on the grounds that they lacked standing to sue. The jury returned a special verdict form and found that GM failed to act in good faith in terminating Olson's franchise but that the bad faith action was not the proximate cause of plaintiff's damages. Further, the jury found that Ray Olson had released GM from all claims brought in the present action. The jury also concluded that GMAC was acting as the agent of GM in repossessing the automobile inventory and that that bad faith conduct caused plaintiff's dam-

## Appendix A-4

ages in the amount of \$558,530.00.

The district court on the basis of the jury's findings entered judgment for defendants. The court explained its ruling in a memorandum dated January 4, 1982. The court held that the jury's finding that GMAC acted as GM's agent mandated the conclusion that plaintiff's release of GM acted also to release GMAC.

Plaintiffs appeal asserting the following: (1) that GMAC is independently liable under the Dealer's Act; (2) that the release of GM did not act to release GMAC; (3) that plaintiff is entitled to a new trial against GM based on a change of law; and (4) that Ray Olson had standing to sue under the Dealer's Act. GMAC filed a cross-appeal seeking additional relief only in the event of our reversal of the district court's judgment. For the reasons set forth in this opinion we affirm the judgment of the district court and accordingly decline to reach the issues raised by the cross-appeal.

### I. GMAC's independent liability

Plaintiffs argue that GMAC is an "automobile manufacturer" within the meaning of the Dealer's Act and is thereby independently liable under the Act for its bad faith repossession of plaintiffs' inventory. GMAC is a wholly owned subsidiary of GM which finances the distribution of automobiles manufactured by GM. Plaintiffs assert that GM had the ability and means to control GMAC's actions and thus, GMAC should be subject to the Dealer's Act. To hold otherwise, plaintiffs reason, would allow GM to do indirectly through GMAC what it could not do directly under the Act.

## Appendix A-5

An "automobile manufacturer" is defined in 15 U.S.C. Sec. 1221 (a) as

any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

The issue of whether a finance company is an "automobile manufacturer" within section 1221 (a) is unresolved. The district court did not address this question. It determined that GMAC could not be held independently liable under the Act because GMAC was not a party to a franchise agreement as required by section 1221 (b). We agree with the district court's ruling as to section 1221 (b) and decline to decide the question of whether a finance company can be an automobile manufacturer under section 1221 (a).

Section 1221 (b) states:

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

Courts have held that one not a party to the franchise agreement cannot be liable under the Dealer's Act. Marquis v. Chrysler Corp., 577 F.2d 624, 629 (9th Cir. 1978); Stansifer v. Chrysler Motors Corp., 487 F.2d 59, 63-64 (9th Cir. 1973); York Chrysler-Ply-

## Appendix A-6

mouth, Inc. v. Chrysler Credit Corp., 447 F.2d 786, 791 (5th Cir. 1971). Thus, even if GMAC were an "automobile manufacturer" under the Act, without more, it could not be independently liable because it was not a party to the franchise.

A party may be held liable under the Act "notwithstanding it is not a party to the franchise if the party contracting with the dealer is the manufacturer's agent." Marquis v. Chrysler Corp., *supra*, 577 F.2d at 630; Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 443 n.23 (9th Cir. 1979). Therefore, the finding by the jury that GMAC acted as GM's agent when it repossessed the inventory is a sufficient basis for GMAC's liability under the Act.

GMAC challenges the jury's finding of an agency relationship between GM and GMAC as it pertains to GMAC's liability. GMAC argues there is no evidence that GM ordered GMAC to repossess Olson Motor's inventory. However, such direct evidence is not necessarily required. The evidence, when weighed in the light most favorable to the jury verdict supports a finding of an agency relationship between GM and GMAC. McGowne v. Challenge-Cook Bros., Inc., 672 F.2d 652, 655 (8th Cir. 1982).

Testimony was introduced at trial to show that GM influenced Ray Olson to finance his business through GMAC. Ray Olson testified that GM officials met with GMAC officials to discuss the capital needs of Olson Motor Company. Further, GMAC's branch manual mandates that GMAC notify GM of its intent to repossess a GM dealer's inventory. Although these facts were disputed by GM we cannot say that the jury verdict was unsupported.

## Appendix A-7

by the evidence. McKnelly v. Sperry Corp., 642 F.2d 1101, 1105 (8th Cir. 1981). Accordingly, we must view GMAC as the agent of GM on the date GMAC repossessed Olson Motor's inventory.

### II. Effect of release

Given the agency relationship between GM and GMAC the central issue becomes whether the release of GM signed by Ray Olson acts also to release GMAC. We conclude that under the facts of this case the release is effective as to GMAC.

The parties agree "that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action." Locafrance U.S. Corp. v. Intermodal Systems Leasing, 558 F.2d 1113, 1115 (2d Cir. 1977). Plaintiffs correctly contend that the release of one joint tortfeasor does not automatically release all other tortfeasors. The present case, however, is not one involving joint tortfeasors but rather, involves an agent acting on behalf of a principal. We view this situation as if GM's own employees had conducted the repossession. Therefore, cases cited by plaintiffs regarding joint tortfeasors are generally inapposite.

Plaintiffs' reliance on Anderson v. Mobile Discount Corp., 592 P.2d 203, 205 (Ariz. App. 1979), for example, is misplaced. There a bank employed a finance company to repossess a debtor's mobile home. The finance company wrongfully repossessed the mobile home and the debtor sued both the bank and the finance company for wrongful repossession under the Uniform Commercial Code. The court held that plaintiff's voluntary dismissal of the bank did not dismiss the finance com-

## Appendix A-8

pany. The court reasoned that "release of one tortfeasor no longer constitutes release of all tortfeasors, absent an agreement that it shall do so." Id. at 204-05. The court rejected the argument that the finance company was released as the bank's agent and concluded that the "[l]iability of the agent is direct and not derivative." Id. at 205.

The distinction between Anderson and the present case is clear. In Anderson, the bank and the finance company were independently liable to the debtor under the UCC. The debtor had separate causes of action against each wrongdoer. The finance company's liability was not based on its agency relationship with the bank but was predicated directly on its own violation of the UCC. In the present case, as we discussed in the previous section, GMAC cannot be held independently liable under the Dealer's Act. GMAC's liability is solely derived from its agency relationship with GM.

For the foregoing reasons we adopt the principle enunciated by this court in Cox v. City of Freeman, Missouri, 321 F.2d 887, 892-93 (8th Cir. 1963) that a valid release of a principal operates also to release the agent. Absent circumstances indicating an opposite intent of plaintiff we hold the release of GM acted also to release GMAC for its repossession of the automobile inventory. Accord Transpac Construction Co. v. Clark & Groff, Eng., Inc., 466 F.2d 823, 829 (9th Cir. 1972).

### III. Motion for new trial

Plaintiffs argue that the district court erred in denying their motion for new trial. The alleged basis for

## Appendix A-9

the new trial motion was that plaintiffs were denied the opportunity to prove that the release was invalid because it was induced by economic duress. This argument is based on the trial court's ruling after the jury verdict that the release was effective as to GMAC. Plaintiffs maintain that the court's post-trial ruling is akin to a change in the law of the case and warrants a new trial.

Plaintiffs' contention is without merit as the record reveals that the jury was instructed that:

A release is not effective where it is involuntarily given due to economic coercion or duress caused by the defendants so that the person giving the release had no other reasonable alternative than to sign it.

Clearly, the duress argument was presented to the jury. Further, plaintiffs' counsel addressed the issue of the effect of economic duress on the validity of the release. Even had the jury been informed that only conduct imputable to GM could avoid the release, no new trial would be appropriate because plaintiffs' position throughout the case was that the conduct of GMAC employees was attributable to GM. Additionally, the only claim of duress advanced by plaintiffs related to the re-possession of plaintiffs' inventory, which plaintiffs argued was done at the direction of GM. Thus, we conclude plaintiffs were not deprived of the opportunity to assert their claim of economic duress.

The standard of review of a denial of a motion for new trial is well-established in this circuit:

## Appendix A-10

A motion for a new trial is addressed to the sound discretion of the trial court and the action of the trial court should not be upset absent a strong showing of an abuse thereof.

Sanden v. Mayo Clinic, 495 F.2d 221, 226 (8th Cir. 1974). We hold that the district court's denial of plaintiffs motion for new trial under the circumstances of this case was not an abuse of discretion. Pitts v. Electro-Static Finishing, Inc., 607 F.2d 799, 803 (8th Cir. 1979).

### IV. Ray Olson's standing

At the close of plaintiffs' case the district court directed a verdict against Ray Olson and ordered dismissal of Ray and Donna Olson on the grounds that they lacked standing to sue under either the Dealer's Act or antitrust laws. On appeal Ray Olson contends that the court erred in holding that he had no standing to sue under the Dealer's Act.

The parties agree that the applicable statute provides that an automobile dealer is a person or entity "operating under the terms of a franchise." 15 U.S.C. Sec. 1221 (c). Courts have held that where the dealership is doing business in the corporate form and where the corporation is the party to the franchise agreement section 1221 (c) dictates that "the locus of the right of action is the corporation." Vincel v. White Motor Corp., 521 F.2d 1113, 1120 (2d Cir. 1975).

This circuit in Lewis v. Chrysler Motors Corp., 456 F.2d 605, 607 (8th Cir. 1972) held that the district

## Appendix A-11

court's dismissal of an individual plaintiff under FED. R. CIV. P. 12(b) (6) was error because:

The importance of determining whether a given litigant is one whose relationship with a manufacturer falls within the sweep of that purpose presents one of the clearest instances where a District Court should act only on the basis of a clear and well-developed record. No such record is present here.

Lewis presents no obstacle here as the district court's determination that Ray Olson was not a proper party plaintiff was made after plaintiff's case-in-chief and upon a clear and well-developed record.

Ray Olson asserts that the fact that he personally guaranteed the corporation's loans and subsequently suffered losses weighs in favor of finding him a proper party plaintiff. We disagree. The principle was clearly enunciated in Sherman v. British Leyland Motors, Inc., 601 F.2d 429 (9th Cir. 1979):

No claim or showing has been made that Vincent during material times did not maintain its corporate existence separate and apart from Sherman, notwithstanding that the latter was president and sole stockholder of the corporation. The franchise in question was signed by Sherman for and on behalf of the corporation. No rights or responsibilities were reserved expressly in any of the written documents in favor of, or against, Sherman. It is true that the franchisor recognized the importance of Sherman's services and those of his wife to the corporation, and it is also true that by reason of Sherman's guarantee of certain obligations of the corporation to third parties the cor-

## Appendix A-12

poration became indebted to him. But we have concluded that these circumstances do not warrant departure from the general rule of separation of identities, nor afford Sherman standing to bring suit in his individual capacity as a shareholder or creditor on any of the claims asserted in this action.

For the reasons stated, we hold that the district court's dismissal of Ray Olson as a party plaintiff was proper based on his lack of standing to sue under the Dealer's Act.

### Conclusion

The judgment of the district court for GM and GMAC is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,  
EIGHTH CIRCUIT.

**Appendix B-1**

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION**

**Olson Motors Company,**

**Plaintiff,**

**vs.**

**General Motors Corporation, and General Motors  
Acceptance Corporation,**

**Defendants.**

**MEMORANDUM AND ORDER**

**Civ. No. 4-71-13**

**Entered January 8, 1982**

Before the Court is plaintiff's motion to alter or amend the judgment by setting aside the judgment in favor of General Motors Acceptance Corporation [GMAC] and entering judgment in favor of plaintiff or, in the alternative, for a new trial. Fred J. Pain, Jr., Esq., and Richard A. Williams, Esq., appeared for plaintiff. James S. Simonson, Esq., and Robert B. Weiss, Esq., appeared for General Motors Corporation [GM]. Clay R. Moore, Esq., appeared for GMAC.

**I.**

In support of its motion to alter or amend the judgment, pursuant to rule 59 (e), Fed. R. Civ. P., plaintiff contests the legal effect given by the

## Appendix B-2

Court to the jury's response to Special Verdict Question No. 13. This question reads as follows: "13. Did Olson Motor Company release General Motors from the claims that it asserts in this lawsuit? The jury answered: "Yes". The Court then ordered judgment in favor of both defendants on all claims.

Plaintiff contends that the legal effect of the release, as found by the jury, relates only to plaintiff's claims against GM, not GMAC. Plaintiff further asserts that the general rule that a release of the master releases the agent is here inapplicable both legally and factually and that such a release must be based on a factual finding of intentional release of the agent; that further, the current application of the rule is limited to those situations where the master has not committed any act and the only way to hold the master liable is on the doctrine of respondent superior. Lastly, plaintiff argues that the applicable principle is that the release of one joint tortfeasor does not release the other, absent a showing of intent to release, and full consideration being received.

### A.

At the outset, the Court must reject plaintiff's initial premise that GMAC is independently liable under the Automobile Dealers' Day in Court Act, 15 U.S.C. Sec. 1221-1225 [Dealers' Act]. In its Order of April 17, 1981, this Court held that GMAC could be found liable only if a common law agency relationship with GM were established. The Court found unpersuasive plaintiff's argument

## Appendix B-3

that GMAC came within the language of the statute as an "automobile manufacturer". Chumbley v. General Motors Corp., No. 6-71125 (E.D. Mich. Sept. 13, 1977); Kolb v. Chrysler Corp., No. 71-C326 (E.D. Wis. Sept. 30, 1977); Van Steen v. Ford Motor Co., No. 73-C-451 (E.D. Wis. March 11, 1977). Contra, Colonial Ford, Inc. v. Ford Motor Co., 592 F.2d 1126, 1129-30 (10th Cir. 1979), rev'dq. 577 F.2d 106 (1977). The Court further concluded that the absence of a franchise between plaintiff and GMAC was fatal to plaintiff's independent claim against GMAC under the Dealers' Act. Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 441-47 (9th Cir. 1979); Marquis v. Chrysler Corp., 577 F.2d 624, 629-30 (9th Cir. 1978); Stansifer v. Chrysler Motor Corp., 487 F.2d 59, 66 (9th Cir. 1973); York Chrysler-Plymouth v. Chrysler Credit Corp., 447 F.2d 786, 791 (5th Cir. 1971).

The Court did, however, leave open the opportunity for plaintiff to attempt to prove that GMAC acted as an agent for GM, who was a "automobile manufacturer" under the Dealers' Act and who had granted a franchise to plaintiff. This agency was not viewed as the statutory agency set forth in the Dealers' Act, but rather one of common law. In response to Special Verdict Question No. 2, the jury found that GMAC did act as an agent of General Motor at the time it removed the automobiles from the premises of Olson Motor Company in October of 1966. Accordingly, the Court must view the repossession of October 22, 1971, as that of GM acting through its agent GMAC.

## Appendix B-4

### B.

The central legal issue thus becomes whether a release of the principal, GM, operates to release its agent, GMAC, when the agent's liability is derived from the principal's status as a automobile manufacturer under the Dealers' Act. Under the facts of this case, the Court concludes that it does.

Plaintiff correctly contends that current law does not view the release of one joint tortfeasor as automatically releasing all other tortfeasors. The instant matter, however, is not the typical case of joint tortfeasors, but one of principal and agent. Thus, cases cited by plaintiff reflecting developments in the law regarding joint tortfeasors are generally inapposite.

Luxenberg v. Can-Tex Industries, 257 N.W. 2d 804 (Minn. 1977), is illustrative. There, a contractor who had entered into a contract with a village for construction of a sewer line brought an action for damages resulting from extra expenses incurred due to excess groundwater infiltration during construction. The contractor's complaint demanded judgment jointly and severally against the clay pipe manufacturer, the consulting engineer, and the village. Prior to trial, however, the contractor and the village filed a stipulation for dismissal providing that all claims of the contractor against the village had been fully settled. The district court then entered an order dismissing the complaint against the clay pipe manufacturer and consulting engineer. The supreme court reversed, holding that the contractor's release of one of the three concurrent tortfeasors would release the other two only if the contractor so intended and if the contractor received full compensation for the damages sought against the remaining tortfeasors. Id. at

## Appendix B-5

806-08.

The court also rejected the engineer's alternative argument that because he was the employee of the village, liable for his negligence under the principle of respondent superior, plaintiff's settlement with the village also released him. The nature of the relationship between the engineer and the village and whether plaintiff had an independent cause of action against the engineer were viewed as issues to be litigated and resolved at trial. Id. at 808.

In the instant action, the jury has determined that GMAC acted as an agent for GM in the repossession of inventory on October 22, 1981. Further, the Court has determined as a matter of law that plaintiff does not have an independent cause of action against GMAC. The act of repossession was the crucial event of plaintiff's claim inasmuch as the jury found that GMAC had acted at GM's direction. Accordingly, there was but one violation of the Dealers' Act, for which GM and GMAC could have been found jointly liable.

This factual setting calls for application of a different rule from that of the modern view that release of one joint tortfeasor does not release other joint tortfeasors not parties to nor named in the release. See Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 346-47 (1971). Rather, the Court believes the rule to be applied is that, absent circumstances indicating a contrary intention, when a plaintiff releases the principal upon settlement of a tort, the principal's agent is also absolved from like claims. Transpac Construction Co. v. Clark & Groff, Engineering, Inc., 466 F.2d 823, 829 (9th Cir. 1972) (applying Oregon law); see International Halliwell Mines, Ltd. v. Continen-

## Appendix B-6

tal Copper & Steel Industries, Inc., 544 F.2d 105, 109-10 (2d Cir. 1976) (applying New York law). In Transpac, as here, the acts complained of by the agent were performed in its capacity as the principal's agent and were, in essence, the same grievances which the plaintiff urged against the principal. See also Cox v. City of Freeman, Missouri, 321 F. 2d 887, 892-93 (8th Cir. 1963) (applying Missouri law); Luxenberg, 257 N.W. 2d at 806-08; Hartigan v. Dickson, 81 Minn. 284, 285-86, 83 N.W. 1091, 1092 (1900); Annot., 92 A.L.R.2d 533, 540-45 (1963).

The three releases signed by plaintiff were to the three separate GM divisions. They were general and without reservation. While it is true that the three releases did not mention GMAC, there is no indication of any intent to reserve any cause of action against GM. Moreover, plaintiff has failed to provide factual support to establish any intention not to release GMAC.

On this question there is a paucity of precedent. The Court has been unable to find, nor has GMAC cited, any federal authority directly on point. Since it appears that this is a case of first impression this Court addresses its task with caution and concern.

It is well established that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action. Locofrance U.S. Corp. v. Intermodal Systems Leasing, Inc., 558 F.2d 1113, 1115 (2nd. Cir. 1977); Dice v. Akron, Canton & Youngstown Railroad, 342 U.S. 359, 361-62 (1952) (FELA case). In particular, for purposes of federal securities law claims, federal law governs the issue of whether a release of one joint tortfeasor releases

## Appendix B-7

all. Locafrance U.S. Corp., 558 F.2d at 1115. The general federal rule with regard to such claims is equally well established: a release of one joint tortfeasor or coconspirator is not a release of others unless the party signing the release intended the others to be released. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 343-47 (1971) (antitrust laws); Aro Manufacturing Co. v. Convertible Top Replacement Co., 377 U.S. 476, 500-01 (1964) (patent law).

There is a general presumption in favor of the validity of releases because the law favors settlement of disputes. See Schmitt-Norton Ford, Inc. v. Ford Motor Co., 524 F. Supp. 1099, 1102 (D. Minn. 1981). This presumption and the general rule, however, are not completely determinative since the narrower issue facing this Court has never been precisely answered. When joint tortfeasors stand in the relationship of principal and agent, with the liability of the agent being derivative of the principal's, the rationale underlying the established rule loses force. The underlying principle of the Restatement rule, adopted into federal law, is that since a release is a contract the intent of the parties should control the scope and effect of the contract, thus the requirement that to release tortfeasors not parties to the release there must be such an agreement.

In this case, the agent's liability is entirely dependent upon that of the principal. It is the principal's status as an automobile manufacturer under the Dealers' Act which creates GMAC's liability to plaintiff. As such, when the liability of the principal terminates through release, it is difficult, if not impossible, to see how the agent can logically or fairly be saddled with liability under that same statute. The jury found that

## Appendix B-8

that plaintiff released GM from all claims, including those under the Dealers' Act. For this release, plaintiff received sufficient consideration. See Schmitt-Norton Ford, Inc., 524 F. Supp. at 1103. This release extinguished GM's statutory liability. It must likewise be viewed as extinguishing GMAC's liability since the act complained of was the asserted basis of liability for both defendants.

This distinction was acknowledged in the Luxenberg case discussed earlier. Even though Minnesota has adopted the Restatement view of release of joint tortfeasors, the court in Luxenberg stated that the nature of the relationship between the agent and the principal and whether plaintiff had an independent cause of action against the agent were relevant issues to be resolved at trial. See Luxenberg, 257 N.W.2d at 806-08. The inference can well be drawn that the Minnesota supreme court views the principal-agent question differently from that of other joint tortfeasors.

This court thus holds that a release of the principal GM also operates to release its agent GMAC, since GMAC's liability is derived from GM's status as a automobile manufacturer under the Dealers' Act.

## II.

In the alternative, plaintiff moves for a new trial on the ground that it was unfairly prejudiced by being deprived of the opportunity to argue that GMAC's wrongful conduct proximately caused the economic duress which caused plaintiff to sign the releases. The court is unaware of any inhibition imposed upon plaintiff regarding argument as to any duress caused by GMAC.

## Appendix B-9

The jury instructions on duress stated that the jury

should consider all the facts and circumstances that bear on showing what financial or economic situation the plaintiff was in at the time it signed the documents. If you find that these facts and circumstances were such that the plaintiff did not have another reasonable alternative except to sign the releases, then you should determine what part the defendant General Motors played in creating or causing this situation.

Since the contention of plaintiff, accepted by the jury, was that GMAC was the agent of GM, this instruction provided the grounds for plaintiff to argue that GMAC was also a source of the economic duress.

Plaintiff raises the following additional grounds in support of its motion for a new trial:

1. The Court erred in dismissing Ray and Donna Olson as plaintiffs.
2. The Court erred in limiting plaintiff's proof of lost profits to the period from 1970 to 1981.
3. The Court erred in excluding evidence as to the post-1970 events concerning the Buick dealership.

As can be seen, these issues were all ruled upon by the Court during the course of trial. At the time of each ruling, the Court stated on the record its reasons for its decisions. Plaintiff fails to present any new reason why the Court erred in so ruling. See Schmitt-Norton Ford, Inc., 524 F. Supp at 1106-07.

## Appendix B-10

Based on the foregoing, the records, and the arguments and briefs of counsel,

IT IS HEREBY ORDERED that plaintiff's motion to alter or amend the judgment by setting aside the judgment in favor of GMAC and entering judgment in favor of plaintiff or, in the alternative, for a new trial is denied.

Dated: January 7, 1982

s/

ROBERT G. RENNER  
United States District Judge

Appendix C-1

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Olson Motor Company, a Minnesota corporation; Ray A. Olson and Donna M. Olson, individually and d/b/a Olson Motor Company,

Plaintiffs,

vs.

General Motors Corporation, a Delaware corporation;  
and General Motors Acceptance Corporation, a New York corporation,

Defendants.

MEMORANDUM AND ORDER

Civil 4-71-13

Entered April 20, 1981

Before the Court are the defendants' motions for summary judgment and the motion of General Motors Acceptance Corporation [GMAC] to dismiss or, in the alternative, for judgment on the pleadings. GMAC has joined the motion for summary judgment of General Motors Corporation [GM] "insofar as the matters asserted in said motion would, if determined in favor of General Motors, require summary judgment to also be granted on behalf of defendant GMAC".

I. Factual Background

For a number of years, plaintiff Ray A. Olson and his father operated, and were sole shareholders of, Olson

## Appendix C-2

Motors, Inc., doing business in Albert Lea, Minnesota, as an automobile dealership, buying and selling Oldsmobile and Cadillac automobiles. In 1961 Ray Olson sold his interest in Olson Motors, Inc. and signed a new dealership agreement to sell Pontiac automobiles, doing business first as Downtown Pontiac and then as Downtown Motors. Olson Motors, Inc. and Downtown Pontiac and Downtown Motors operated from adjacent and shared facilities.

In June 1969 the Olson Motor Company, as a new corporation, entered into separate, but essentially identical, Dealer Selling Agreements with the Pontiac, Oldsmobile, and Cadillac Divisions of GM. Ray Olson operated Olson Motor Company from a larger facility, which he had constructed at a new location in Albert Lea. In the course of his business at the new facility, Ray Olson soon experienced severe financial difficulties. In October 1969 GMAC, which had a financing agreement with Olson Motor Company, determined that the company was "out of trust" and impounded the company's new and used car inventory. Shortly thereafter, in early November, two California businessmen, Richard Lebert and Herbert Chance, loaned Olson Motor Company about \$60,000. This money was used by the company to pay GMAC. After these funds were advanced, Lebert, Chance, and Olson decided to sell the business assets to Arthur G. Krueger for \$37,000. Lebert and Chance bought out Olson's personal equity in the business by giving him \$5,000 cash and by forgiving the \$60,000 indebtedness. The sale arrangements were contingent upon the grant of Dealer Selling Agreements by the three General Motors divisions to Krueger. Oldsmobile, Pontiac, and Cadillac were each willing to enter into a new Dealer Selling Agreement with Krueger, provided that they

### Appendix C-3

would be released from all claims arising out of the plaintiffs' prior transactions with them.

The above facts are essentially uncontested. There is however, a great deal of dispute about other events leading up to the sale of the Olson Motor Company. In his affidavit, Ray Olson details the efforts of GM to force him into a new facility through broken promises, conflicting claims by the operating divisions, and threats of termination of the Olson franchise. He also alleges that: (1) The characteristics of the new facility were dictated by the divisions; (2) the divisions determined the amount of capital and the methods by which he could obtain the capital for the new operation; (3) GM recognized that the increased volume necessitated by the facility would preclude Ray Olson from obtaining adequate floorplanning for new and used automobiles from the local banks; and, as a result, (4) representatives of Pontiac sent employees of GMAC to Ray Olson for purposes of underwriting his new and used car financing.

In summary, plaintiffs' claim that GM forced Ray Olson, by threat of franchise termination, into a business situation that the Olsons neither asked for nor wanted. That GM then failed to provide Ray Olson with the necessary assistance or advice to help him manage the new enlarged operations. As a result, the Olson Motor Company franchise, failed within six months after moving into the new facility. Plaintiffs argue that, from the facts set forth in Ray Olson's affidavits, it is clear a jury could conclude the failure of Ray Olson's business to be a direct result of GM's course of conduct in forcing Ray Olson into a new facility, with a capital structure dictated by GM and financing provided by GMAC. Plaintiffs further claim GMAC was an active parti-

## Appendix C-4

pant in this scheme through its financing arrangements and subsequent impoundment of plaintiffs' automobiles.

Plaintiffs bring this action against defendants under the Automobile Dealers' Day in Court Act, 15 U.S.C. Sec. 1221-1225 [ADDCA], the Sherman Act, 15 U.S.C. Sec. 1-2, and Minn. Stat. Sec. 325.15-1236 (re-numbered as Minn. Stat. Sec. 325D.18-.28).

### II. Summary Judgment

#### A. Whether GM and GMAC have been released from all liability to plaintiffs.

Defendants' first ground for summary judgment is based on three letters signed by Ray Olson, which GM and GMAC claim act, as a matter of law, as releases of any liability they might have. While the language of the three releases varies, all were general and comprehensive in releasing the three divisions from any and all claims arising out of or connected with the various selling agreements. Defendants assert these releases relieve them of all liability.

Plaintiffs contend the intent of the releasing party the acceptance of consideration in satisfaction of the claim, and adequacy of consideration are all questions for the jury. Gray v. General Motors Corp., 434 F.2d 110, 112 (8th Cir. 1970); Barilla v. Clapshaw, 306 Minn. 437, 439-40, 237 N.W.2d 830, 831-32 (1976). Moreover, even if the jury finds that the releases are facially valid, an issue is raised by the affidavits of Ray Olson as to whether the releases may be voided because of economic coercion or duress.

## Appendix C-5

The elements of economic duress are:

1. One side involuntarily accepted the terms of another;
2. The circumstances permitted no other alternative; and
3. The circumstances were the result of coercive acts of the opposite party.

Oskey Gasoline & Oil Co., Inc. v. Continental Oil Co. 534 F.2d 1281, 1285-88 (8th Cir. 1976). In general, whether facts, as alleged, are sufficient to constitute a defense of duress is a matter of law for the court but whether the facts alleged actually exist is a jury issue. Oskey, 534 F.2d at 1286.

Plaintiffs maintain that the fact here satisfy the Oskey test and that the defense of duress is applicable. Ray Olson's desire not to sell his business is allegedly evidenced by his actions after the vehicles were impounded by GMAC: (1) He borrowed \$60,000 from friends in California; (2) he pledged corporate stock and conveyed the building he owned so as to secure the loans obtained to provide for continued business operation; and (3) he continued to resist the sale of the business until the end of the calendar year 1969.

As to the second element of duress -- absence of a viable alternative -- plaintiffs argue that not only had Ray Olson invested all his own personal assets, as well as most of his father's, but that he had also involved two close friends. Thus, when GM allegedly instructed him that the releases had to be given, he had no other op-

## Appendix C-6

tion since failure to sell would have resulted in serious adverse financial injury to his friends.

The final requirement, that the circumstances were the result of coercive acts, purportedly is shown by the entire scheme. Specifically, plaintiffs contend that GM forced Ray Olson to build a new facility that GM knew would require greater managerial skills than Olson possessed and greater cash requirements than plaintiffs' local banks could handle, then failed to provide managerial advice and counseling, in violation of the franchise agreement. Further, plaintiffs contends GM allegedly brought in GMAC to control the financing.

Defendants, in their answers, raise the releases as separate and affirmative defenses. Plaintiffs argue that under Minnesota law when an answer asserts release as a defense no responsive pleading is required and the release is deemed denied or voided. Boxell v. Continental Casualty Co., 249 Minn. 317, 321-22, 82 N.W.2d 223, 225-26 (1957); see Fed. R. Civ. P. 8 (d). It would be premature at this time to grant summary judgment on the basis of the releases. See Fed. R. Civ. P. 56.

### B. GM's responsibility for the acts and omissions of defendant GMAC.

For its second argument, GM says that it should not be held liable for the acts of GMAC. It is undisputed that GMAC is a wholly-owned subsidiary of GM. In order for separate corporate identities to be disregarded, it must be shown that the subsidiary is the alter ego or such instrumentality of the parent that a fraud would be worked were not the corporate form ignored. See Hudson Minneapolis, Inc. v. Hudson Motor Car Co., 124 F. Supp. 720, 723 (D. Minn. 1954) (quoting Commerce

## Appendix C-7

Trust Co. v. Woodbury, 77 F.2d 478, 487 (8th Cir. 1935). GM argues that since it is undisputed that GMAC operates as a distinct, separate entity, subject to the court's jurisdiction, and that is fully responsible for, and entirely capable of, managing its own financial affairs, its separate corporate existence cannot be ignored. National Bond Finance Co. v. General Motors Corp., 238 F. Supp. 248, 255-58 (W.D. Mo. 1964), *aff'd per curiam*, 341 F.2d 1022 (8th Cir. 1965). GM also argues it is not responsible for GMAC's actions on any agency theory since "[o]ne company's exercise over a second corporation of a controlling influence through stock ownership does not make the second corporation an agent of the first." Quarles v. Fugua Industries, Inc., 504 F.2d 1358, 1364 (19th Cir. 1974); Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc., 456 F. Supp. 831, 841 (D. Del. 1978).

Plaintiffs respond that the facts as recited in the affidavits and depositions would support a jury finding that GMAC was either acting as an agent for, or under the control, of GM. First, plaintiffs assert that GMAC's involvement in plaintiffs' used and new car floorplanning provides a basis for a finding that GMAC was acting for GM in connection with the distribution of plaintiffs' automobiles. In his affidavit, Ray Olson also alleges contact between representatives of the defendants from which a jury could conclude that the two were acting together during the critical period. The parallel conduct allegedly commenced when GM indicated to Ray Olson that the company needed approximately another \$71,000 into his business before the end of that working day or his entire automobile inventory would be removed.

Agency has been defined as "the relationship which

## Appendix C-8

results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Lee v. Peoples Cooperative Sales Agency, Inc., 201 Minn. 266, 268, 276 N.W. 214, 216 (1937) (quoting Restatement of Agency Sec.1[1]). Determinations of defendants' manifestations and intent must rest upon material facts. Plaintiffs' allegations, taken in the light most favorable to them, place these matters into issue for jury resolution. Barney Motor Sales v. Cal Sales, Inc., 178 F. Supp. 172, 175 (S.D. Calif. 1959). Summary judgment is inappropriate.

### C. Plaintiffs' claim for punitive damages.

Defendants contend that plaintiffs are not entitled to punitive damages under either the ADDCA or the Sherman Act. The ADDCA provides for compensatory damages and the cost of suit. 15 U.S.C. Sec. 1222. Punitive damages are not recoverable. Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 427 (2d Cir.), cert. denied, 371 U.S. 829 (1962). Likewise, punitive damages are not recoverable under the Sherman Act since it already provides for a statutory penalty of treble damages, 15 U.S.C. Sec. 15; see Amott v. American Oil Co., 609 F.2d 873, 888 (8th Cir. 1979).

Plaintiffs agree that punitive damages are not recoverable under these two theories of recovery, but contend that this is a matter for jury instruction, not summary judgment. They also contend the Court should retain the punitive damages claim on the possibility that plaintiffs might raise at trial a jury issue on such damages. The Court views the question of punitive damages as a matter well within the purview of summary judgment. Further, should plaintiffs find it necessary at the close

## Appendix C-9

of trial to raise alternative theories of recovery, the issue of punitive damages under such theories would then be more appropriately addressed. At this time, plaintiffs have not presented any claim under which punitive damages are recoverable. Accordingly, plaintiffs' claim for punitive damages shall be stricken.

### D. Whether plaintiffs' claim of consent decree violations should be dismissed because of plaintiffs' lack of standing.

- (1) GMAC is not a "manufacturer" as defined in 15 U.S.C. Sec. 1221 (a);
- (2) GMAC is not a party to the plaintiffs' dealer franchise nor did any other relationship between GMAC and plaintiffs constitute a "franchise" within the meaning of 15 U.S.C. Sec. 1221 (b);
- (3) As a matter of law, therefore, GMAC is not subject to the ADDCA, 15 U.S.C. Sec. 1221 et seq., and plaintiff may not maintain Count I as a claim for relief against GMAC.

In Count I plaintiffs seek damages against both GM and GMAC for violations of the ADDCA, 15 U.S.C. Sec. 1221 et seq. Paragraphs XI and XVI of Count I allege that GMAC, on October 22, 1969, seized plaintiffs' automobile inventory after demanding that plaintiff Olson put additional working capital into his business. Plaintiffs claim this act caused Olson Motor Company to go out of business. This, it is argued, constituted a termination of plaintiffs' franchise, which is cognizant under the ADDCA. Plaintiffs' claim against GMAC is essentially that Ray Olson was forced to abandon his dealer franchises because GMAC refused to con-

## Appendix C-10

tinue wholesale financing service and that it exercised its rights under security agreements to take possession of Olson's automobile inventory.

GMAC argues that it is not an "automobile manufacturer" as that term is defined in 15 U.S.C. Sec. 1221 (a), which reads:

The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, partnership, or corporation which acts for and is under the control of such manufacturer or assembling of passenger cars, trucks or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automobile vehicles.

The purpose of the ADDCA is to provide protection to the dealer's right to buy and resell a manufacturer's automobiles. GMAC argues that the definition must necessarily refer to those entities controlled by, and which act for, the actual manufacturer in the establishment and maintenance of sales and distribution through dealerships; that only such entities would be involved in the granting of dealers' franchises. Further, GMAC contends the ADDCA cannot logically be construed to cover a manufacturer's subsidiaries not charged with the creation of a dealership network, for such subsidiaries would necessarily have nothing to do with dealer franchises.

Legislative history of the ADDCA lends limited support to GMAC's proposition. GMAC points to an earli-

## Appendix C-11

er bill covering factory-dealer relationships and the termination of franchises. In that bill "manufacturer" was defined to include any business entity engaged in the business of "financing motor vehicles intended for resale." Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 84th Congress on H.R. 528, H.R. 2688, and H.R. 6544 384-88. This language was not, however, adopted. GMAC contends that this rejection evidences Congress' intent not to include financing entities such as itself. Plaintiffs, however, argue that the language used in the current statute is actually broader than that in the early bill and shows that Congress contemplated circumstances under which a finance company, wholesaler, or perhaps another dealer would come within the definition, when under the control of a manufacturer.

The case law on this issue is not in unanimity. Three federal district courts have held that a finance company is not within the definition found in section 1221 (a). Chumbley v. General Motors Corp., No. 6-71125 (E.D. Mich. Sept. 13, 1977); Kolb v. Chrysler Corp., No. 71-C-326 (E.D. Wis. Sept. 30, 1977); Van Steen v. Ford Motor Co., No. 73-C-451 (E.D. Wis. March 11, 1977). However, unnecessary in the light of the Court's determination relative to the lack of the requisite franchise.

GMAC also premises its motion on the argument that the granting of wholesale financing does not constitute a "franchise" defines "franchise" as follows:

The term "franchise" shall mean the written agree-

## Appendix C-12

ment or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

The ADDCA is intended to protect a dealer's right to deal in a manufacturer's automobiles; thus a franchise must necessarily be the document that embodies that right. There is no such agreement between GMAC and defendants. The agreement between Olson and GMAC dealt exclusively with the extension of credit and did not grant to Olson the right to resell GM cars or any other product that could rationally be the subject of a franchise. Only a very broad reading of the language in section 1221 (b) could lead to the conclusion that GMAC's arrangement was a franchise; a reading this Court is not prepared to adopt. Courts have generally held that one not a party to the agreement cannot be liable under the ADDCA. Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 441-47 (9th Cir. 1979); Marquis v. Chrysler Corp., 577 F.2d 624, 629-30 (9th Cir. 1978); Stansifer v. Chrysler Motor Corp., 487 F.2d 59, 66 (9th Cir. 1973); York Chrysler-Plymouth v. Chrysler Credit Corp., 447 F.2d 786, 791 (5th Cir. 1971). Even if GMAC were a "manufacturer" under the ADDCA, without more, it could not independently be found liable because no "franchise" existed between it and plaintiffs.

A party, however, may still be held to be liable notwithstanding it is not a party to the franchise if it acts as an agent for the manufacturer who is in a contractual relationship with the dealer. See Sherman, 601 F.2d at 441-47; Marquis, 577 F.2d at 630; Stansifer, 487

Appendix C-13

F.2d at 64; York Chrysler-Plymouth, 447 F.2d at 791. Defendants vigorously deny the existence of any agency relationship. Plaintiffs, however, as evidence of such agency, point to the circumstances that culminated in the demise of Olson Motor Company. As noted before, they put forward the communication between GM and GMAC regarding the Olson franchise and the parallel conduct on the part of the defendants, arguing that a jury could conclude that the two were acting together during the time in question. While defendants strongly contest the validity and weight to be given this evidence, the Court is not in a position to decide what are essentially factual questions. The question of agency presents disputed factual issues, material to this case, that must be resolved by a jury and precludes the granting of summary judgment. Fed. R. Civ. P. 56.

Based on the foregoing and the arguments and briefs on counsel, IT IS HEREBY ORDERED that

1. Defendants' motions for summary judgment are granted to the extent that plaintiffs' request for punitive damages is stricken; their motions are denied in all other respects.
2. GMAC's motion to dismiss or, in the alternative, for judgment on the pleadings is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 17, 1981.

s/

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ROBERT G. RENNER  
United States District Judge

Appendix D-1

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Olson Motor Company, a Minnesota corporation,  
Plaintiff,

vs.

General Motors Corporation, a Delaware corporation;  
and General Motors Acceptance Corporation, a New  
York corporation,

Defendants.

ORDER

CIV. NO. 4-71013

Entered August 26, 1981

Having received the jury's verdict in the above captioned case, IT IS ORDERED that:

1. The Clerk of Court enter judgment on the merits in favor of the defendants and against plaintiff.
2. The Clerk of Court dismiss with prejudice plaintiff's Complaint and the claims of Ray A. Olson and Donna M. Olson, who have already been dismissed from this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 25, 1981

s/

ROBERT G. RENNER  
United States District Judge

## Appendix E-1

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Olson Motor Company, a Minnesota corporation,

Plaintiff,

vs.

General Motors Corporation, a Delaware corporation;  
and General Motors Acceptance Corporation, a New  
York corporation,

Defendants.

SPECIAL VERDICT FORM

Civil No. 4-71-13

Entered August 12, 1981

1.A. Did General Motors fail to act in good faith  
in performing or complying with any of the terms of the  
franchise of Olson Motor Company or in terminating or  
canceling the franchise?

Answer: Yes  
"Yes" or "No"

If your answer to Question 1.A. was "yes", then an-  
swer Question 1.B.

If your answer to Question 1.A. is "no", then answ-  
er Question 2.

1.B. Was the failure of General Motors to act in good  
faith a proximate cause of the damages claimed by the

## Appendix E-2

plaintiff in this case?

Answer: No  
"Yes" or "No"

If your answer to Question 1.B. was "yes", then answer Question 1.C.

If your answer to Question 1.B. was "no", then answer Question 2.

1.C. What amount, if any, will fairly compensate Olson Motor Company for the damage, if any, proximately caused by the failure by General Motors to act in good faith?

Answer: \$ \_\_\_\_\_

2. Did GMAC act as an agent of General Motors at the time it removed the automobiles from the premises of Olson Motor Company in October of 1969?

Answer: Yes  
"Yes" or "No"

If your answer to Question 2 was "yes", then answer Question 3.

If your answer to Question 2 was "no", then answer Question 6.

3. Did GMAC, in connection with taking possession of the Olson Motor Company inventory in October of 1969, fail to act in good faith?

## Appendix E-3

Answer: Yes  
"Yes" or "No"

If your answer to Question 3 was "yes", then answer Question 4.

If your answer to Question 3 was "no", then answer Question 6.

4. Was the removal of the automobiles from the premises of Olson Motor Company a proximate cause of the damages claimed by the plaintiff in this case?

Answer: Yes  
"Yes" or "No"

If your answer to Question 4 was "yes", then answer Question 5.

If your answer to Question 4 was "no", then answer Question 6.

5. What amount, if any, will fairly compensate Olson Motor Company for the damage, if any, proximately caused by GMAC taking possession of the Olson Motor Company inventory in October of 1969?

Answer: \$ 588,530.

6. A. Did Olson Motor Company fail to furnish to General Motors complete and accurate financial statements, showing the true condition of the dealership's business?

Appendix E-4

Answer: Yes  
\_\_\_\_\_  
"Yes" or "No"

B. Did General Motors waive compliance by Olson Motor Company of this provision?

Answer: Yes  
\_\_\_\_\_  
"Yes" or "No"

7. A. Did Olson Motor Company fail to have owned net working capital in an amount no less than \$110,000 at any time from and after June 2, 1969, and before the taking of possession of its motor vehicle inventory in October of 1969?

Answer: Yes  
\_\_\_\_\_  
"Yes" or "No"

B. Did General Motors waive compliance by Olson Motor Company of this provision?

Answer: Yes  
\_\_\_\_\_  
"Yes" or "No"

8. A. Did plaintiff, intentionally or unintentionally, make any material misrepresentation in the information submitted in connection with its applications to the Oldsmobile and Cadillac divisions for the Dealer-Selling Agreements obtained on June 2, 1969?

Answer: No  
\_\_\_\_\_  
"Yes" or "No"

B. Did General Motors waive compliance by Olson Motor Company of this provision?

## Appendix E-5

Answer: No  
\_\_\_\_\_  
"Yes" or "No"

9. Did General Motors and GMAC enter into a conspiracy to harm or unreasonably restrain competition?

Answer: No  
\_\_\_\_\_  
"Yes" or "No"

If your answer to Question 9 was "yes", then answer Question 10.

If your answer to Question 9 was "no", then answer Question 13.

10. If you find there was such a conspiracy between General Motors and GMAC, did it cause actual injury to competition in the relevant market?

Answer: \_\_\_\_\_  
\_\_\_\_\_  
"Yes" or "No"

If you answered "yes" to Questions 9 and 10, then answer Question 11.

If you answered "no" to Questions 9 or 10, then answer Question 13.

11. If you find there was such a conspiracy between General Motors and GMAC in restraint of trade, was it a proximate cause of the damages claimed by the plaintiff in this case?

Answer: \_\_\_\_\_  
\_\_\_\_\_  
"Yes" or "No"

## Appendix E-6

If your answer to Question 11 was "yes", then answer Question 12.

If you answered "no" to Question 11, then answer Question 13.

12. What amount, if any, will fairly compensate Olson Motor Company for the damages, if any, proximately caused by the conspiracy, if any, between General Motors and GMAC in restraint of trade?

Answer: \$ \_\_\_\_\_

13. Did Olson Motor Company release General Motors from the claims that it asserts in this lawsuit?

Answer: Yes  
"Yes" or "No"

Dated: August 12, 1981

s/ \_\_\_\_\_  
FOREPERSON OF THE JURY

**Appendix F-1**

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION**

**Olson Motor Company, a Minnesota corporation, Ray A.  
Olson and Donna M. Olson, individually and d/b/a  
Olson Motor Company,**

**Plaintiffs,**

**vs.**

**General Motors Corporation, a Delaware corporation,  
and General Motors Acceptance Corporation, a New  
York corporation.**

**Defendants.**

**4-71 Civ. 13**

**Tuesday  
August 4, 1981  
St. Paul, Minnesota**

**Transcript of Proceedings**

**ROBERT W. RILEY  
Official Court Reporter  
782 U.S. Court House  
St. Paul, Minnesota 55101**

## Appendix F-2

Tuesday Morning Session  
August 4, 1981  
10:15 o'clock, a.m.

(Appearances as heretofore noted.)

THE COURT: Let me state for the record so you will have a clear record of what it is I am doing. The record will reflect that we are gathered in chambers and that the Court has ruled that it does not intend to give GMAC proposed instruction D, which reads as follows:

"You are instructed that a corporation can only act through employees, officers and others who are agents of the corporation. If, therefore, you find that Olson Motor Company effectively released General Motors Corporation from liability, you must also find that Olson Motor Company released all those acting as agents on behalf of General Motors; and, if you find that GMAC acted as General Motors' agent, as is claimed by the plaintiff, then you must find that Olson Motor Company, by releasing General Motors, also released its alleged agent, GMAC."

It is the Court's view that there is no evidence which would support this instruction since there was no evidence which would in any way indicate that plaintiff intended to or did release GMAC by signing the GM release.

Mr. Moore.

MR. MOORE: My proposed alternative to that instruction, Your Honor, is in the form of my proposed question 4, which I believe is before the Court, which is in the special verdict form. It simply asks the jury to de-

### Appendix F-3

termine whether or not, by releasing GM, assuming, of course, the release is found effective as to GM, that under all of the facts and circumstances, whether or not Olson Motor Company intended also to release GMAC, particularly in view of the fact that GMAC has claimed in this case to have acted as the agent of GM, and while the alternative to D is not posed in the form of a jury instruction as such, it is posed in the form of a special verdict question, and the Court has not yet indicated what direction it's going with regard to instructions, vis-a-vis the special verdict questions. I don't know yet, so I have proposed that alternative -- I want to make the record clear -- in the form of that question. And if it requires an instruction to pose the alternative to proposed D and then I would do so.

THE COURT: I wish to tell you at this time that I do not intend to give your requested question, either.

MR. MOORE: Question No. 4?

THE COURT: Yes.

MR. MOORE: And I gather the Court's ruling means that even if I were to reframe question No. 4, in the form of a jury instruction as such, that you wouldn't give that, either?

THE COURT: I don't intend to, since the Court feels strongly there was no evidence in that area.

MR. MOORE: All right. I guess my point is made that I feel there was sufficient evidence to submit that to the jury.

THE COURT: All right. Off the record.

(Discussion and adjournment off the record.)

**Appendix G-1**

**UNITED STATES COURT OF APPEALS  
For the Eighth Circuit**

**Nos. 82-1198/1267-MN**

**Olson Motor Company, a Minnesota corporation;  
Ray A. Olson and Donna M. Olson, individually  
and d/b/a Olson Motor Company,**

**Appellants/Cross-Appellees,**

**vs.**

**General Motors Corporation, a Delaware corpora-  
tion; and General Motors Acceptance Corporation;  
a New York corporation,**

**Appellees/Cross-Appellants.**

**September Term 1982  
ORDER DENYING REHEARING  
(Entered May 17, 1983)**

The Court, having considered appellants' peti-  
tion for rehearing and suggestions for rehearing en  
banc and being now fully advised in the premises,  
hereby orders the petition for rehearing and sugges-  
tions for rehearing en banc denied.  
May 17, 1983.

Appendix H-1

February 27, 1970

Cadillac Motor Car Division  
General Motors Corporation  
7701 Normandale Road  
Edina, Minnesota 55435

Gentlemen:

As a result of negotiations, of which you have been notified, I have sold certain of the physical assets of my business to Art Krueger Motors, Inc. as of February 27, 1970.

Please take notice that I elect to and do hereby terminate my current Cadillac Dealer Selling Agreement entered into with you, and request that you waive the required thirty (30) days notice of such termination so that the same will become effective as of the above date of sale.

In consideration of your execution of a new Cadillac Selling Agreement with Art Krueger Motors, Inc., at my instance and request, I hereby acknowledge that I have no claims whatsoever, of any kind or nature, against Cadillac Motor Car Division, General Motors Corporation, arising out of or connected with my operation under the terms of any Cadillac Selling Agreement in effect with me prior to the date hereof.

Very truly yours  
OLSON MOTOR COMPANY

BY \_\_\_\_\_  
Ray Olson

## Appendix I-1

Date February 27, 1970

Oldsmobile Division  
General Motors Corporation  
Minneapolis, Minnesota

Gentlemen:

Please take notice that I have elected to and do hereby terminate my current Oldsmobile Selling Agreement entered into with you, and request that you waive the required one (1) month notice of such termination so that the same will become effective upon receipt of this notice by you.

Please be further advised that in consideration of the execution by Oldsmobile Division, General Motors Corporation, at our instance and request, of a new Oldsmobile Selling Agreement with Art Kueger Motors, Inc. to whom I have sold certain of the physical assets of my business, I hereby remise and release Oldsmobile Division, General Motors Corporation, from and all claims which I ever had, now have, or may hereafter have arising out of or connected with any Oldsmobile Selling Agreement previously in effect between me and Oldsmobile Division, General Motors Corporation.

Very truly yours,

OLSON MOTOR COMPANY

BY \_\_\_\_\_  
President  
BY \_\_\_\_\_  
Secretary

## Appendix J-1

Pontiac Motor Division  
General Motors Corporation      March 2, 1970  
Suite 433  
3033 Excelsior Blvd.  
Minneapolis, Minnesota 55416

Gentlemen:

As a result of negotiations of which you have been notified, we have sold all of the physical assets of our business to Arthur G. Krueger, Jr.

Please take notice that we elect to and do hereby terminate our current Selling Agreement with you and ask that you waive the one (1) month prior notice of said termination prescribed by said Agreement so that said termination shall be effective immediately upon receipt of this notice by you.

In consideration of your execution of a new Pontiac Selling Agreement with Arthur G. Krueger, Jr., at our instance and request, we hereby acknowledge that we have no claims arising out of any provisions of our aforesaid Agreement relating to repurchase of new cars, parts or accessories; purchase of signs, equipment or other personal property; claims of loss on leasehold.

Consequently, we hereby release Pontiac Motor Division from any and all claims or obligations arising from or connected with any Pontiac Selling Agreement heretofore in effect between the undersigned and said Pontiac Motor Division and the termination of the aforesaid Agreement, except that,

We request the following disposition of our accounts with

## Appendix J-2

Pontiac Motor Division:

Open Account to be responsibility of: Former Dealer  
 New Dealer \_\_\_\_\_

Hold-Back Account to be: Paid Off to Old Dealer  
 Transferred to New Dealer \_\_\_\_\_

Suppl. Fleet Allowance to be the responsibility of:  
Former Dealer  New Dealer \_\_\_\_\_

We intend to make claim for compensation for parts purchases sold at Wholesale and understand that, to be given consideration, such claim must be presented to Pontiac Motor Division within 30 days following date of this letter.

Will you please acknowledge your acceptance of the termination as submitted herein.

Very truly yours,

OLSON MOTOR COMPANY

BY \_\_\_\_\_

Ray A. Olson, President

## Appendix K-1

### OLSON'S EXHIBIT 55

#### PONTIAC MOTOR DIVISION GENERAL MOTORS CORPORATION

##### Dealer Selling Agreement

AGREEMENT, effective the 2nd day of June, 1969,  
by and between Pontiac Motor Division-General Motors  
Corporation, hereinafter called Pontiac, and  
OLSON MOTOR COMPANY,

a corporation of ALBERT LEA FREEBORN  
City      County  
MINNESOTA, hereinafter called Dealer.  
State

#### GENERAL PURPOSE OF THIS AGREEMENT

The purpose of this Selling Agreement is to set forth  
the respective functions, obligations and responsibilities  
of Pontiac and of Dealer in the sale of Pontiac motor ve-  
hicles, parts and accessories by Pontiac to Dealer and in  
the sale and servicing of such products by Dealer.

In entering into this Selling Agreement, Pontiac and  
Dealer recognize that the success of Pontiac and of its  
dealers depends importantly upon how well Pontiac and  
each of its dealers fulfill customers' needs—upon the qual-  
ity and value which Pontiac offers to the public in the mo-  
tor vehicles, parts and accessories it manufactures and u-  
pon how well each authorized Pontiac dealer fulfills its  
functions through aggressive, sound and ethical sales effort  
at the retail level and through conscientious regard for  
quality customer service.

## Appendix K-2

Pontiac has elected to enter into this Selling Agreement with Dealer in reliance upon the ability of Dealer to meet and perform the operating requirements hereof and in reliance upon the personal qualifications and business ability of the person or persons who are named in Paragraph THIRD hereof. Pontiac expects, and Dealer in executing this Agreement acknowledges, that Dealer will actively, aggressively and honestly promote the sale of Pontiac motor vehicles, parts and accessories to customers in Dealer's area of sales responsibility and will give to the public prompt, efficient and courteous service; and that Dealer will conduct its business in a manner which will reflect favorably upon Pontiac and Pontiac products and upon Dealer and its operations, and which will preserve the good will of Dealer and its operations and Pontiac, as well as the product good will that has been created by the manufacture of Pontiac motor vehicles, parts and accessories of the highest quality and design.

Dealer has elected to enter into this Selling Agreement with Pontiac because of its knowledge of the Pontiac reputation for integrity and fair business practices and of the customer acceptance of Pontiac products. Dealer expects of Pontiac, and Pontiac acknowledges, that Pontiac will produce and provide, at fair and competitive prices, motor vehicles, parts and accessories, which are saleable in Dealer's area of sales responsibility and which are of a quality and design that under normal conditions and when serviced properly will give good performance for their owners; that, insofar as possible, Pontiac will make such products available in quantities to meet Dealer's reasonable requirements in Dealer's area of sales responsibility; that Pontiac will assist in creating a demand for such products by advertising in various advertising media; and that Pontiac will assist Dealer in meeting Dealer's sales and

## Appendix K-3

service responsibility by making available to Dealer sales assistance and advice, advertising materials and campaigns and instruction in sales, business management, service and service management.

IN CONSIDERATION of the foregoing and of the promises hereinafter made by the parties to each other, it is agreed as follows:

**FIRST:** Subject to the terms and conditions herof, Pontiac will sell and Dealer will buy Pontiac motor vehicles with Dealer having the obligation to develop properly the sale thereof at retail particularly in the following area:

STATE OF MINNESOTA - The following communities

Freeborn County - Albert Lea, Alden, Clarks Grove  
Conger, Emmons, Freeborn, Geneva, Gordonsville, Hartland,  
Hayward, Hollandale, London, Manchester, Myrtle, Oakland,  
Twin Lakes

Including non-post office areas served by post office stations located in the above named communities.

**SECOND:** The additional provisions set forth in the attached "Additional Provisions Applicable to Pontiac Dealer Selling Agreement", bearing Form No. T-451-Pontiac-65 are hereby made a part of this Agreement with the same force and effect as if set forth at length herein.

**THIRD:** This Agreement is a personal service contract,

## Appendix K-4

and is entered into by Pontiac with Dealer in reliance upon and in consideration of the personal qualifications, and the representations made to Pontiac with respect thereto, of the following named person or persons who, it is agreed, will substantially participate in the ownership of Dealer and/or will actively participate in the operation of Dealer's Pontiac dealership:

Name	Participating in Ownership
<u>Ray A. Olson</u>	Yes
Participating in Operation	
	Yes

For the purposes of this Agreement the person or persons designated above shall be responsible for any act or omission of any of Dealer's agents or employes which may be contrary to the purposes and objectives of this Agreement or to any provision of this Agreement.

Concurrently with the execution of this Agreement, Pontiac has endorsed its approval of the ownership, financial interests and active management of Dealer as represented by Dealer on a "Dealer Statement of Ownership, Financial Interests and Active Management" form supplied by Pontiac. No change in such ownership, financial interests or active management of Dealer shall be made without the prior written approval of Pontiac. Any such approved change shall be evidenced by the execution of a revised "Dealer Statement of Owner, Financial Interests and Active Management".

**FOURTH:** This Agreement shall continue in force and govern all relations and transactions between the parties for a term commencing on the effective date hereof and expiring Oct. 31, 1970. At the end of the stipulated

## Appendix K-5

term, this Agreement shall automatically terminate without notice or action on the part of either party unless sooner terminated as hereinafter provided in Section 14.

In the event a new and superseding form of Pontiac Dealer Selling Agreement is offered to Pontiac dealers generally effective November 1, 1970, Pontiac may terminate this Agreement by prior written notice to Dealer, provided that, at the same time, Pontiac offers Dealer such new and superseding form of Selling Agreement for a period of not less than the then unexpired term of this Agreement.

FIFTH: This Agreement is not valid until and unless it bears the signature or facsimile signature of the General Sales Manager and is countersigned by an Assistant General Sales Manager, a Regional Manager, an Assistant Regional Manager or a Zone Manager of the Pontiac Motor Division-General Motors Corporation.

IN WITNESS WHEREOF, the parties hereto have execute this Agreement in duplicate as of the day and year first above written.

Dealer	<u>Olson Motor Company</u>	
	Firm Name	
S/By	<u>Ray A. Olson</u>	
	Officer of Firm and Title	Pres-V.P.
S/By	<u>Donna M. Olson</u>	
	Officer of Firm and Title	Sec-Treas.
Town and State	<u>Albert Lea, Minnesota</u>	
Witness: S/	<u>Signature illegible</u>	

## Appendix K-6

### PONTIAC MOTOR DIVISION General Motors Corporation

S/By \_\_\_\_\_ Thomas H. King  
General Sales Manager

S/By \_\_\_\_\_ D. G. SCHULTZ  
Zone Manager

(If executed by a representative of Dealer, title such as President, Partner, etc., must be indicated.)

If Dealer is a corporation, show State in which incorporated:  
\_\_\_\_\_ Minnesota

## Appendix L-1

GMAC EXHIBIT 192 A 4-71-CIV.13  
1063 Agreement No.

### INVENTORY SECURITY AGREEMENT ORIGINAL

For the purpose of securing payment of the indebtedness under this security agreement between the undersigned dealer (hereinafter referred to as the debtor), with a place of business at 2114 E. Main Albert Lea, Minn., and General Motors Acceptance Corporation (hereinafter referred to as the secured party), with a place of business at 4640 W. 77th St. Minneapolis, Minn., the debtor hereby assigns and transfers to the secured party subject to the terms and conditions set forth below and upon the reverse side hereof all its (his, their) title and interest in and to the following personal property, including any attachments or accessories thereon, and in furtherance of the foregoing agrees that the secured party has herewith and shall have a security interest in said personal property until full payment of the sum of Thirteen thousand two hundred sixteen and 50/100 Dollars (\$13,216.50), together with interest thereon at the rate of Eight percent (8.0%) per annum, upon demand, as evidenced by a certain promissory note of even date herewith, made by the debtor payable to the order of the secured party:

(Itemization of automobile descriptions and debt Omitted)

Dealer Name and Address  
Olson Motor Company  
2114 E. Main, Albert Lea, Minnesota  
Date of Note 6/4/69  
No. 1063

## Appendix L-2

Executed in triplicate, this 4 day of June, 1969 at  
Albert Lea Freeborn Minnesota  

---

(City) (County) (State)

The debtor hereby acknowledges receipt of a true, correct and complete copy of this security agreement.

Olson Motor Company  
(Debtor's Signature)  
S/By Ray A. Olson Pres.  
(If Corp. or Part.) (Title)

GENERAL MOTORS ACCEPTANCE CORPORATION

S/By D. F. Mundy  
(Asst. Secretary-Treasurer)

### PROVISIONS

1. (Omitted).
2. (Omitted).
3. (Omitted).
4. (Omitted).
5. (Omitted).
6. In the event that the debtor defaults in prompt payment of the aforesaid indebtedness under and according to said promissory note, or in the due performance of or compliance with any of the terms, provisions or conditions hereof, or that a proceeding in bankruptcy, insolvency, receivership or reorganization be instituted by or against the debtor or its (his, their) property or the business of the debtor is in any wise liquidated, or that the secured party deems itself insecure or said property or any part thereof in danger of loss, misuse, seizure or confiscation, the secured party or any sheriff or other officer of the law may take immediate possession of said property, including any attachments or accessories thereto, without demand or further notice and without legal process;

## Appendix L-3

for this purpose and in furtherance thereof, the debtor shall, if the secured party so requests, assemble said property and make it available to the secured party at a reasonably convenient place designated by it, and the secured party shall have the right, and the debtor does hereby authorize and empower the secured party, to enter upon the premises wherever said property may be and remove same.

In the event of repossession of said property, the secured party shall have such rights and remedies as are provided and permitted by law, including the right to reasonable attorneys' fees and legal expenses incurred for the purpose of retaking and disposing of said property.

7. (Omitted).

## Appendix M-1

### LEGISLATIVE HISTORY

#### (3 U.S. Code Cong. and Admin. News 4596-4609) FRANCHISE AUTOMOBILE DEALERS-SUITS AGAINST MANUFACTURERS

For text of Act see p. 1333

Senate Report No. 2073, May 31, 1956 [To accompany S. 3879]

House Report No. 2850, July 20, 1956 [To accompany S. 3879]

The House Report No. 2850

The Committee on the Judiciary, to whom was referred the bill (S.3879) to supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of United States to recover compensatory damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers, having considered the same; report favorably thereon with amendments and recommend that the bill do pass.

### PURPOSE OF THE BILL AS AMENDED

The purpose of the bill as amended by the committee is to supplement the antitrust law of the United States so as to permit a franchised automobile dealer to bring suit for damages, without regard to the amount in controversy, in United States district courts for the failure of the automobile manufacturer to act in good faith in performing

## Appendix M-2

or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the dealer's franchise. The bill creates a cause of action where none previously existed in that, irrespective of contractual provisions, it grants a right of review in the Federal courts of disputes between automobile manufacturers and their dealers involving the good faith of the manufacturer in complying with, in terminating, or in not renewing the franchises.

In addition to the provisions of the written agreements or contracts between automobile manufacturers and dealers, the bill in its definition of good faith imposes the duty on each party to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. Unless the transactions between the parties involve coercion or intimidation, or threats of coercion or intimidation, the duty of good faith imposed by the bill does not prohibit recommendation, endorsement, exposition, persuasion, urging or argument normal in competitive commercial relationships.

### REASONS FOR BILL

Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automobile vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These inves-

### Appendix M-3

tigations have disclosed practices and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises.

Since World War II, production in the automobile industry has been increasingly concentrated among the three major producers: General Motors Corp., Ford Motor Co., and the Chrysler Corp. In 1946, General Motors produced 46 percent of all passenger cars; by 1954 its share of the market had increased to 52 percent, with Ford producing 31 percent and Chrysler 13 percent. In 1954 the remaining 3 independent automobile producers accounted for only 4 percent of all passenger cars produced. Furthermore, the Department of Justice advised the committee that-

figures thus far for 1956 suggest that General Motors now produces more than 55 percent of all passenger cars in this country.

What is more, competition to the three major automobile producers from independents has failed to materialize in the postwar period; in fact, it has become more remote.

General Motors Corp., with assets of \$6,344,772,000, sales amounting to \$12,443,277,000, and net profits of \$1,189,477,000, in 1955, was the largest corporation in the United States. The second largest automobile producer in the United States, Ford Motor Co., in 1955 ranked third among American industrial corporations. In 1955, Ford Motor Co. had assets of \$2,585,337,000,

#### Appendix M-4

sales amounting to \$5,594,022,000, and net profits of \$436,991,000. Chrysler Corp., the third ranking member of the automobile industry in 1955, ranked fifth among United States industrial organizations and had assets of \$1,362,883,000, sales in the amount of \$3,466,222,000, and net profits of \$100,063,000.

Although automobile dealers are substantial businessmen in their local communities, in comparison with the automobile manufacturer, an individual dealer is a small-business man whose size makes it impossible for him to bargain effectively. In contrast with the economic power of each of the automobile manufacturers, the average dealer has an investment in the amount of \$118,000. There are approximately 40,000 franchised automobile dealers in the United States. Roughly one-half, or 20,000, of these dealers have contracts with General Motors, while 9,000 are franchised by Ford Motor Co.

While the individual automobile dealer may be classified as a small-business man, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than \$5 billion and employ approximately 668,000 persons.

Extensive testimony was adduced by the committee at the hearings on this bill with respect to both the contractual relationship between automobile manufacturers and their dealers, and marketing practices current in the automobile industry. Distributive conditions condemned by the Federal Trade Commission in its report on the motor-vehicle industry, issued in 1939, have continued up to the present time, according to investigations made by the Subcommittee on Automobile Marketing Practices.

## Appendix M-5

of the Senate Committee on Interstate and Foreign Commerce and by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary.

In 1939, the Federal Trade Commission after an extensive investigation of automobile marketing practices stated:

The Commission finds that motor-vehicle manufacturers, and, by reason of their great power, especially General Motors Corp., Chrysler Corp., and Ford Motor Co., have been, and still are, imposing on their respective dealers unfair and inequitable conditions of trade, by requiring such dealers to accept, and operate under, agreements that inadequately define the rights and obligations of the parties and are, moreover, objectionable in respect to defect of mutuality; that some dealers, in fact, report they have been subjected to rigid inspections of premises and accounts, and to arbitrary requirements by their respective motor-vehicles or other goods, deemed excessive by the dealer, or to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise; and that adequate provisions are not included for an equitable method of liquidation of such investments, sometimes made at the insistence of the respective motor-vehicle manufacturer.

In connection with its study of the General Motors Corp., the staff of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary reported on automobile distribution systems as follows:

The franchise system for distribution of automobiles

## Appendix M-6

has been described as a system devised by the automobile manufacturers to secure maximum rights with a minimum of liability \* \* \*. It may be defined as an agreement by which the manufacturer appoints the dealer to handle his line, and the dealer, in return for this privilege, agrees to conduct his business according to the standards and desires of the manufacturer. It is the method by which the manufacturer assures himself of control over the distribution of his product in what amounts to quasi-integration to the retail level of distribution. The manufacturer can maintain this control because of his superior economic position which he retains by threat of franchise termination.

In various suits in the past, General Motors has characterized its dealer franchise as follows:

1. That it does not constitute a legal contract;
2. That it lacks mutuality, and represents no legally enforceable obligation on the part of the seller to sell or on the part of the dealer to buy;
3. That it provides that the dealer shall perform to the satisfaction of the seller, and that the question of satisfaction is for the seller alone to determine;
4. That no damages are recoverable by the dealer since loss of profits was not contemplated by the parties;
5. That it is unenforceable and void because of indefiniteness, uncertainty, and lack of consideration;
6. That, if valid, the agreement gives the factory the right to terminate at will.

With few exceptions, the courts have sustained the

## Appendix M-7

manufacturer's interpretation of the agreement, and the courts have held that dealers fail to state a cause of action when suit is brought on the agreement alone.

The hearings of the investigations conducted during this Congress in the Senate contain numerous instances of automobile manufacturers coercing and intimidating their franchised dealers. A primary source of the manufacturers' power over their dealers stems from the unilateral nature of the franchise agreements.

Automobile dealers who have been subjected to economic duress and intimidation by manufacturers have been unable to obtain redress in the courts. Confronted with express provisions in the dealer's franchise, courts have been reluctant to impose a condition of good faith on the part of the manufacturer. In *Bushwick-Decatur Motors, Inc., v. Ford Motor Co.* (116 F.2d 675, C.A. 2, (1940)), the court stated:

With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy.

In *Buggs v. Ford Motor Co.* (113 F.2d 618, C.A. 7, (1940)), the court stated:

An examination of its terms, which are many, indicates that it was dictated by the manufacturer at Detroit, and drawn by its counsel with the avowed purpose of protecting the manufacturer to the utmost and granting, if any, few rights to, and the smallest possible protection of, the agent.

## Appendix M-8

It is one which affords some support for the wisdom and the necessity of legislation which protects the weak against a strong party in situations like the instant one.

In adjudicating disputes between manufacturers and dealers, application of contract law concepts by the courts has prevented relief to the dealer. In *Ford Motor Co. v. Kirkmyer Motor Co.* (65 F.2d 1001, C.A. 4, (1933)), the court stated:

While there is a natural impulse to be impatient with a form of contract which places the comparatively helpless dealer at the mercy of the manufacturer, we cannot make contracts for parties or protect them from the provisions of contracts which have been made for themselves. Dealers doubtless accept these one sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them; but, after they have made such contracts, relying upon the good faith of the manufacturer for the protection which the contracts do not give, they cannot, when they get into trouble, expect the courts to place in the contracts the protection which they themselves have failed to insert.

Similarly the court in *S. B. McMaster v. Chevrolet Motor Co.* (3 F.2d 469, E.D., S.C., (1925)), stated as follows:

\* \* \* they are entirely within their rights in so framing their contract as to carry out their intention. The intentions of the parties in the absence of any grounds of public policy must prevail; and their intention must be gathered from the terms of the contract itself.

## Appendix M-9

This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, canceling, or not renewing his franchise.

The committee recognizes that, in response to the congressional investigations and legislative proposals during this Congress, many changes have been made, or are contemplated, in the contractual relationship of automobile manufacturers and their dealers. For example, effective March 1, 1956, General Motors Corp. made available to all its dealers a choice of three selling agreements:

- (1) A 5-year agreement cancelable by General Motors only for cause and cancelable by the dealer without cause on 30 days' notice;
- (2) A 1-year agreement cancelable by General Motors only for cause and cancelable by the dealer without cause on 30 days' notice;
- (3) An indefinite term agreement cancelable by either party without cause on 90 days' notice.

In addition the revised selling agreements of General Motors include new provisions which create important dealer benefits. These new benefits could mitigate many of the conditions which caused complaint under the old franchise. The committee has been informed that Ford Motor Co. also is considering revising its franchise agreements in order to provide its dealers benefits comparable to those recently made available by General Motors.

While it is true these developments in the automobile industry may diminish some of the abuses found to exist, this does not derogate from the necessity for legislation

## Appendix M-10

at this time. For one thing, the new General Motors selling agreements afford no guaranty against dealer coercion or intimidation or threats thereof by the manufacturer. Furthermore, what the automobile manufacturers do in response to congressional investigation or in contemplation of pending legislation, they can readily undo. The record before the committee demonstrates that, in the past, gains made by dealers after investigation into market practices of the automobile manufacturers have not always been retained. This bill assures a minimum amount of protection for the dealer under the terms of any automobile franchise.

### EXPLANATION

Section 1 of the bill defines "automobile manufacturer," "automobile dealer," "franchise," "commerce," and "good faith."

Section 1(a) limits an "automobile manufacturer" to those concerns engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons. Included in the definition of an automobile manufacturer is a concern which acts for "and is under control of" the manufacturer in connection with the distribution of automobile vehicles. The quoted language has been added by the committee to make it clear that the manufacturer is liable only for his own "coercion, intimidation, or threats of coercion or intimidation" or the acts of agents or distributors subject to his control.

The words "or other automotive vehicles" which appeared in section 1(a) of the bill passed by the Senate have been stricken in order to limit the bill's coverage to manufacturer-dealer transactions involving the dis-

## Appendix M-11

tribution of passenger cars, trucks, and station wagons. The amendment, therefore, excludes transactions involving buses, tractors, motorcycles, and other transportation vehicles propelled by power. This accomplishes two purposes: First, it avoids any ambiguity resulting from use of the phrase "or other automotive vehicles"; second, it restricts the bill to those areas of automobile distribution in which congressional committees have ascertained a present need for remedial legislation.

Section 1(b) of the bill defines "franchise" to mean the written agreement or contract between an automobile manufacturer and dealer. The bill approved by the Senate gives broader meaning to the term "franchise" by including not only the written agreement or contract but also any "understanding or arrangement between an automobile manufacturer and any automobile dealer." The words "understanding or arrangement" have been deleted in order to safeguard against the possible inclusion of anticompetitive trade arrangements between the manufacturer and the dealer, such as arrangements which might limit the location of new dealers.

Another amendment to section 1(b) adds the term "engaged in commerce" to make it clear that this legislation prescribes rules governing commerce in the automobile industry.

Section 1(c) has been amended to define an automobile dealer as any concern "resident in the United States or in any Territory thereof or in the District of Columbia," operating under the terms of a written franchise and engaged in the sale of passenger cars, trucks, or station wagons. This amendment limits the right to bring suit in the district courts of the United States to dealers re-

## Appendix M-12

sident in the United States or its Territories. The record before the committee was concerned only with coercive practices by manufacturers with respect to their United States dealers. The committee has no information with respect to such practices involving dealers situated in foreign countries.

Section 1(d) defines the term "commerce."

Section 1(e) declares "good faith" to mean the duty of the automobile manufacturer and his franchised dealer to act in a fair and equitable manner toward each other so as to guarantee the one-party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. A proviso has been added by the committee to assure that recommendation, endorsement, exposition, persuasion, urging, or argument of the kind that is normal in competitive commercial relationships is not to be deemed by itself to constitute a lack of good faith.

By contrast section 1(e) of the bill approved by the Senate would require each party to a franchise to act in a-

fair, equitable, and nonarbitrary manner so as to guarantee such other party freedom from coercion, intimidation, or threats of coercion or intimidation, so as to preserve all equities of such other party which are inherent in the nature of the relationship between such parties by such franchise.

The committee's amendment to section 1(e) has four purposes. First, it makes it clear that the manufacturer is obligated to protect his dealer only from coercion by the manufacturer or persons subject to his control, and

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that there is no obligation on the part of the manufacturer to protect the dealer against coercion from other sources. Second, the word "non-arbitrary" is stricken for being vague and indefinite. Third, the committee deleted the provision which would require a party to a franchise to preserve "all the equities" of the other party which are inherent in the nature of the franchise relationship. This has been done to preclude any interpretation inconsistent with antitrust principles. Fourth, a proviso has been added to affirm that normal sales persuasion and recommendation by itself is consonant with good faith.

Against this background, section 2 authorizes a franchised dealer to bring suit against the manufacturer in an appropriate United States district court without respect to the amount in controversy, to recover damages by reason of the manufacturer's failure, after the passage of the act, to act in good faith in the performance of the franchise or in terminating, canceling, or not renewing the franchise. The manufacturer, in addition to any other defense, is given the right to defend a dealer action by showing that the dealer failed to act in good faith from and after the passage of this act. In order to sustain this defense, the manufacturer would be required to show that the dealer failed to act in a fair and equitable manner toward the manufacturer so as to guarantee the manufacturer freedom from coercion, intimidation, or threats of coercion or intimidation from the dealer.

Present section 2 differs in several respects from the corresponding section of the bill approved by the Senate. In the bill as amended, only activities by the manufacturer which occur from and after the passage of this measure are actionable. The purpose of this change is to avoid liabilities based on past acts which were not ille-

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gal when committed.

The committee had deleted the right to a reasonable attorney's fee as an element of damages. Under the amended bill, the dealer would be limited to recovery of damages sustained and the cost of suit.

The committee has added three sections to the bill approved by the Senate. Section 3 prescribes a 3-year statute of limitations for dealer suits.

Section 4 affirms that no provision of the antitrust laws is repealed, modified, or superseded, directly or indirectly, by any provision of the bill.

Section 5 declares that no provision of this bill invalidates any provision of the laws of any State except insofar as there is a direct conflict which cannot be reconciled.

The principal effect of the bill as amended by the committee is to give the dealer a right of action against the manufacturer, where the manufacturer fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion, intimidation, or threats of coercion or intimidation. The term "fair and equitable" as used in the bill is qualified by the term "so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation. Each party to an automobile franchise would have a special obligation to guarantee the other party freedom from coercion or intimidation of any kind.

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The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer.

If the evidence discloses normal sales recommendation or persuasion the manufacturer would not be liable. On the other hand, if the manufacturer goes beyond normal sales recommendation or persuasion, in appropriate circumstances, his activities could give rise to a cause of action under the bill. Evidence with respect to manufacturer recommendations or persuasion will be relevant as bearing upon the issue of coercion or intimidation.

Manufacturer coercion or intimidation or threats thereof is actionable by the dealer where it relates to performing or complying with any of the terms or provisions of the franchise, or where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise. Thus, where a dealer's resistance to manufacturer pressure is related to cancellation or nonrenewal of his franchise a cause of action would arise.

The bill, however, does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the man-

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ufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.

The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objectives of this legislation. Under the bill, a manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment.

The manufacturer's obligation to act in good faith extends to all of his franchised dealers, including: dealers who sell automobiles to other dealers, franchised or not, for resale to the public; dealers who sell outside of a "zone of influence" or "territory"; and dealers who sell automobiles at less than the manufacturers suggested resale prices. Contract provisions restricting an automobile dealer from transacting business with customers of his choice, or from selling outside a specified territory could violate the antitrust laws. Any restriction on a dealer's right to sue based on the fact that he is selling to another dealer, franchised or not, for resale to the public or based on the fact that he sells outside of a territory or sells at cut rates would contravene the congressional purposes underlying section 4 of this bill which provides that this measure shall not repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws.

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Similarly, a manufacturer, in a dealer's suit for damages stemming from a manufacturer's refusal to supply adequate cars, could not set up by way of defense, as lack of good faith, the fact that the dealer sold new cars to other new or used car dealers for resale to the public. Also, a dealer located near another franchised dealer who has sold new cars to used car dealers for resale would not be authorized under this measure to sue a manufacturer for supplying dealers who sell cars to other dealers for resale.

### MINORITY REPORT (Omitted in this Appendix)

### ADDITIONAL VIEWS (Omitted in this Appendix)